

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 28

THE SOUTH COVINGTON & CINCINNATI STREET RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF COVINGTON, JOHN J. CRAIG, MAYOR, AND
HENRY B. SCHULER, CHIEF OF POLICE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

FILED APRIL 8, 1912.

(23,149)



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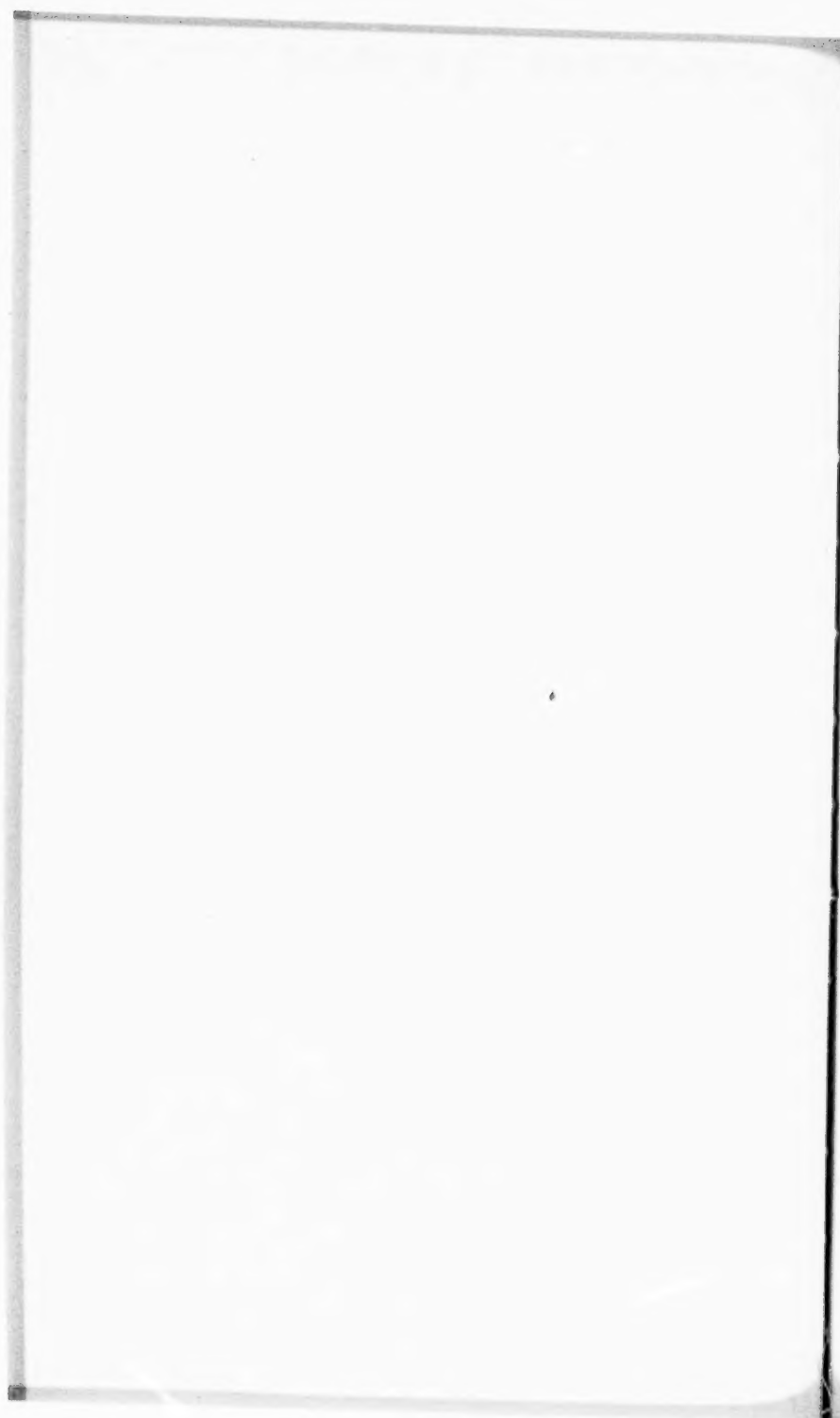
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a COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Sixth Day of February, 1912.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG, Mayor, and Henry B. Schuler, Chief of Police of said City of Covington, Appellees.

Appeal from the Common Law & Equity Division of the Kenton Circuit Court.

Be it remembered that heretofore, to-wit: on the 24th day of November, 1911, the appellant by its attorneys filed in the office of the Clerk of the Court of Appeals a transcript of the record, which is in words and figures following, to-wit:

1 Pleas Before the Honorable the Kenton Circuit Court, at the Court-house in Covington, on the 7th day of August, 1911.

Hon. M. L. Harbeson, Judge Common Law & Equity Division.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
a Corporation,
ag't

CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG, Mayor, and HENRY B. SCHULER, Chief of Police of said City.

Be it remembered that on the 22nd day of November, 1910, plaintiff filed its petition herein, which is as follows:

Petition.

Kenton Circuit Court.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
a Corporation, Plaintiff,

vs.

CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG, Mayor, and Henry B. Schuler, Chief of Police of said City, Defendants.

Petition in Equity.

Plaintiff is a corporation under the laws of Kentucky defendant, The City of Covington, is a municipal corporation of the second

class under the laws of Kentucky, Defendant John J. Craig is the Mayor of said City of Covington and Henry B. Schuler is Chief of Police of said City of Covington.

2 Plaintiff owns and operates a street railway system on and over the streets of the City of Covington. Its lines of street railway extend within and from the towns of Ludlow and West Covington, municipalities under the laws of Kentucky adjacent to the City of Covington, and within and from territory outside of the said City of Covington, not included in any municipality through and over the streets of the City of Covington over and across the Suspension Bridge between the cities of Covington and Cincinnati, Ohio, a public toll bridge and that it is engaged in the carriage of passengers for hire over said lines and from said municipalities and territory into the City of Cincinnati, Ohio, and from the City of Cincinnati, Ohio, into said territory and municipalities; it is also engaged in the carriage of passengers over and upon the streets of Newport, Kentucky, and the towns of Bellevue and Dayton, Kentucky and territory contiguous thereto and from the City of Newport through the City of Covington into the City of Cincinnati, Ohio.

That about ninety per cent of the passengers carried by plaintiff on and over the streets of Covington are passengers whom plaintiff has undertaken to carry, and is in the act of carrying, from the municipalities of Newport, Ludlow, West Covington, Covington and territory contiguous thereto to the City of Cincinnati, Ohio, or from the City of Cincinnati, Ohio, to said municipalities and territory; that none of the cars of said company operate solely within the City of Covington, but that every car of this plaintiff, except two, which passes over and upon the streets of said city passes either to or from the City of Cincinnati.

3 That the population of the said cities and territory in the State of Kentucky which rides upon the cars of this plaintiff is composed largely of people whose business interests and employment are in the City of Cincinnati, Ohio, their homes being in said places in the State of Kentucky; that about — thousand people go either through or from the City of Covington to the City of Cincinnati, Ohio, on said cars to their places of business in said City of Cincinnati, Ohio, between the hours of five thirty and eight thirty in the morning of each week day and return from said City of Cincinnati, Ohio, to their homes in or beyond the City of Covington between the hours of five and six in the evening; that said number varies in a material degree from day to day owing to the state of the weather, as many of the residents of Covington reside at such a short distance from the Ohio River that in favorable weather they walk either to or from their places of business, or both, while in the event of unfavorable weather, or sudden rain or storm, they become passengers upon the cars of the plaintiff.

That the General Council of the City of Covington, on or about the 24th day of October 1910, passed an ordinance which with its title is as follows:

Council Ordinance No. 4872.

An ordinance to further regulate the operation of street cars and street car lines in the city of Covington, and providing for the health, comfort, and safety of passengers using said cars and providing penalties for the violation thereof.

Be it ordained by the General Council of the City of Covington:—

SECTION 1. That it shall be unlawful for any person, corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the City of Covington, to permit more than one-third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor day.

SECTION 2. No such person, company or corporation shall
4 suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide and open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the Police Court of said City.

SECTION 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall be ever permitted to stand by or remain within the enclosure thus provided for the motorman.

SECTION 4. It shall be the duty of every such person, company or corporation to at all times keep its car thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant and the Board of Health of the City of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

SECTION 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

SECTION 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines

within the corporate limits of the City of Covington to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the General Council of the City of Covington, by resolution at any time direct that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by Section 2 hereof.

SECTION 7. Any person, company or corporation, violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the Police Court of the City of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all 5 & 6 police officers of such City and others exercising Police power, to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction. And the Chief of Police is hereby directed to assign at least one Police Officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance.

SECTION 8. Nothing contained in this ordinance shall be held or construed to be or to effect a renewal or an extension or enlargement of the right of any person, company or corporation to use or occupy the streets and highways of the City of Covington for Street Railway purposes.

SECTION 9. This ordinance shall take effect thirty days from and after its passage and approval by the Mayor.

(Signed)

J. M. BESTERMAN.

Passed by Board of Councilmen, October 10, 1910.

Passed by the Board of Aldermen, October 20, 1910.

Approved by the Mayor, October 24, 1910".

Plaintiff says that the City of Covington threatens to enforce said ordinance and will do so unless restrained by this court. Plaintiff says that said ordinance is void and of no effect for the following reasons:

1. Because the City Council of the City of Covington had no power under its charter to pass the same.
2. Because said ordinance embraces more subjects than one and they are not expressed in the title thereof.
3. Because said ordinance is an unreasonable and unlawful regulation of the business of this plaintiff.

Each of said street cars of said company will carry without danger to person or health and with comfort, a greater number of passengers than are permitted by said ordinance to be carried thereon.

7 It is impossible for plaintiff, operating its lines as it does through the City of Covington from and to other municipalities as aforesaid, to control to the requirement of said ordinance the number of passengers riding upon its cars. That the persons resident in Covington and other municipalities and territory adjacent thereto go to their business in Cincinnati, Ohio, on the cars of this plaintiff with a period of three hours in the morning and return from their business to their homes in less than an hour in the evening of every day; that in said morning hours and in the evening hour referred to plaintiff could not; without the exercise of force which it has no power or authority to exercise, limit the number of passengers to be carried by it upon its cars as provided by said ordinance.

Plaintiff is without power or right to exclude intending passengers from its cars in the City of Cincinnati, Ohio, bound for said places in the State of Kentucky, or in said places in the State of Kentucky bound for the City of Cincinnati. It is without power or right to eject from its cars when reaching the City of Covington passengers who lawfully took passage thereon outside of said City of Covington until said passengers have reached their destination. Plaintiff is without power or right to exclude from its cars intending passengers in the territory and municipalities outside of the City of Covington but in the State of Kentucky merely because said cars may respectively contain more than the number of passengers set forth in said ordinance, and is without power to eject from said cars within the City of Covington and before they have reached their destination, passengers who have lawfully taken passage on said cars in said municipalities or territory outside of the City of Covington.

8 Any attempt on the part of said company to exclude intending passengers or to eject actual passengers from its cars, such as would be necessary in order to comply with said ordinance, would result in disorder on said cars, physical injury to employees or passengers and law suits for damages against the plaintiff. In any and all such cases plaintiff would not be protected by said ordinance from said suits and claims on the part of actual or intending passengers.

Furthermore, in any and all such cases and in any and all prosecutions for the violation of said ordinance the exact number of people within the car in question at the time in question and the exact number of people permitted to ride within said car would not be susceptible of definite proof, and said ordinance is therefore void for uncertainty.

Plaintiff says that in many cases passengers who take passage upon its cars intending, and showing an intention to ride upon the platform thereof, change their minds thereafter and desire to go into the car, by reason of rain or otherwise and that this plaintiff would not, in such case, have the power to, prevent such passengers from going into the car, nor to eject one who had wrongfully entered the same. That said ordinance, while purporting to penalize the street railroad company for permitting more than the prescribed number to enter

its said cars, does not penalize any passenger who enters its said cars, having more than the prescribed number within.

Plaintiff says that under the duties which rest upon it as a common carrier, and the rights of the traveling public, that a member of the traveling public has the right to board any car which

9 has come to a stop and upon which there is reasonable room for him and has the right to enter said car and that it is the duty and right of the company to receive him. That in such case the question whether there is reasonable room on said car for him and whether he has the right to board the same, and whether it is the right or duty of the company operating the same to receive him, depends upon circumstances and conditions which vary from time to time the hour of the day, the state of the weather, the age or condition of said person and otherwise, and that this ordinance is unreasonable and void because it is an attempt to arbitrarily obstruct and limit said right and duty respectively, and takes no account of special conditions or circumstances.

Plaintiff says that there is only one bridge across the Ohio River between the City of Covington and the City of Cincinnati, Ohio, upon which the cars of plaintiff are or can be operated. That the demands of the travelling public and many of the ordinances under which plaintiff operates require that its passengers be carried to Fountain Square in the City of Cincinnati, that it is impossible for this plaintiff to propel and operate over said bridge and over and upon the streets in the City of Cincinnati necessary to pass through Fountain Square to accommodate the public in the rush hours of the morning and evening aforesaid at the rate prescribed in said ordinance.

Plaintiff further says that there is no street railroad lines in the United States in as populous a community as that served by this plaintiff, which is or ever has been able at the rush hours of the day, when people are either going to or from their work, to

10 prevent its cars from being at times over-crowded to a degree which would be a violation of this ordinance.

Plaintiff says that the provision of said ordinance requiring, under penalty, that the temperature of its cars shall never be permitted to be below 50 degrees Fahrenheit is unreasonable, arbitrary and oppressive.

Plaintiff says that its cars are filled with the most approved and efficient heaters which are obtainable for said purpose and that said heaters are kept in operation at all times when passengers desire or their comfort requires, but that it is impossible, with the constant opening and closing of doors rendered necessary by the business of said company and the varying tastes among the passengers as to the degree of ventilation, and the sudden changes in the weather to insure that any specific degree of temperature be maintained.

Plaintiff says that it exercises the utmost care to keep its cars thoroughly cleaned and ventilated but that the requirement that each car shall be fumigated once a week is an unreasonable, unnecessary and oppressive requirement.

4. Said ordinance is arbitrary, unreasonable, oppressive and void

in this, that it is made to take effect within thirty days from and after its passage. That it was and is impossible for this plaintiff within said period to equip its cars with railings as set forth therein; that plaintiff has at all times during the rush hours of the day operated all the cars in its possession available for said purpose and that it was and is impossible for plaintiff to obtain any new or additional cars within said period of thirty days.

11 5. On or about October 7, 1892, an ordinance was passed by the Council and approved by the Mayor of the City of Covington and accepted by plaintiff, to remain in force by its terms for a period of twenty years from said date, wherein it was provided that during said period plaintiff should run its Cincinnati cars at intervals not to exceed seven (7) minutes from six A. M. to five P. M. and not to exceed five minutes from five P. M. to eight P. M. and not to exceed ten (10) minutes from eight P. M. to midnight, and all of the lines of cars to be operated not to exceed ten (10) minutes apart.

Said ordinance, so accepted by this plaintiff, became and is now a contract between this plaintiff and the City of Covington which precludes said City from requiring this plaintiff to run a greater number of cars or more frequently than provided in said ordinance.

The enforcement of the ordinance of October 24, 1910, hereinabove set forth would require this plaintiff to run cars more frequently than is required in said ordinance or contract of October 7, 1892, or result in the imposition of penalties upon this company for failure so to do.

Plaintiff says that the City of Covington has no power or authority to enforce said ordinance of October 24, 1910, contrary to the provisions of said contract or ordinance of October 7, 1892.

Plaintiff further says that the said ordinance of October 24, 1910, is for the foregoing reasons an impairment of the obligation of the contract existing between plaintiff and said City of Covington in violation of Article I, Section 10 of the Constitution of the United States.

6. For the reasons hereinabove set forth said ordinance
12 is an unlawful and unreasonable interference with and regulation of interstate commerce and is in violation of Article I, Section 8 of the Constitution of the United States.

7. For the reason hereinabove set forth said ordinance deprives this plaintiff of its property without due process of law in violation of Section 1 of the 14th Amendment to the United States Constitution.

This plaintiff says that unless restrained by this Court defendant will proceed to the enforcement of said ordinance and will bring numerous prosecutions against this plaintiff and that the attempted enforcement of said ordinance by this plaintiff would result in numerous law suits against it as aforesaid, all to the irreparable injury to this plaintiff, resulting in a multiplicity of suits and prosecutions.

Wherefore plaintiff prays that a temporary injunction issue restraining the defendants, and each of them from enforcing said

ordinance pending the hearing and determination of this cause and that upon the final hearing and determination the same be made perpetual.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff.

STATE OF KENTUCKY,
County of Kenton, ss:

James C. Ernst, being duly sworn says that he is the President of the plaintiff corporation; that the facts stated and allegations made in the foregoing petition are true; that irreparable injury would result to plaintiff by reason of numerous prosecutions and law suits resulting from the attempting enforcement of said ordinance if plaintiff should be subjected to the delay of giving notice.

The injunction herein prayed for has not been refused by
13 any Judge.

JAMES C. ERNST.

Sworn to before me and subscribed in my presence this 22nd day of November, 1910.

[SEAL.]

A. A. HERMES,
Notary Public in and for said County & State.

My commission expires Feb. 15, 1912.

Thereupon on same day a restraining order issued and was afterwards returned as follows:—

Restr'g Order.

Plaintiff having given bond in the sum of \$1,000.00 which bond is approved by the Court, defendants and each of them are hereby restrained from enforcing in any manner the ordinance approved October 24, 1910, regulating the operation of street cars and referred to in the petition.

And the court fixes the 2nd day of December 1910 as the time at which plaintiff shall move the court to grant the injunction herein.

Executed the within restraining order November 26th 1910 by delivering a true copy hereof to John C. Craig Mayor and highest officer of the City of Covington November 22nd 1910 and a true copy hereof to Henry C. Schuler, Chief of Police of the City of Covington, November 22nd 1910 and a true copy hereof to John J. Craig, the Mayor of the City of Covington November 26th, 1910.

J. T. BOSKE, S. K. C.,
By HY. KLAINE, D. S.
JOHN DARENKAMP, D. S.

14 Thereupon on same day an injunction Bond was executed herein which is as follows:—

Injunction Bond.

We undertake that the plaintiff shall pay to the defendant the damages not exceeding \$1,000.00 which they may sustain by reason of the restraining order in this action, if it be finally decided that the same ought not to have been granted.

Witness our hands, this 22nd. day of November 1910.

NATIONAL SURETY COMPANY,
By S. W. FERRIS, *Att'y in Fact.*

Attest:

BEN MACKE, *Clerk,*
By A. C. ELLIS, JR., *D. C.*

Thereupon on same day a summons issued and was afterwards returned as follows:—

Summons.

You are commanded to summon City of Covington, John J. Craig Mayor of City of Covington; Henry B. Schuler, Chief of Police of City of Covington, to answer in twenty days after the service hereof, a petition in equity filed against them in suit numbered 12434 in the Kenton Circuit Court at Covington, and warn them that upon failing to answer, said petition will be taken as confessed, or they will be proceeded against for contempt.

Witness the Clerk of said Court, this 22nd. day of Nov. 1910.

BEN MACKE, *Clerk,*
By A. C. ELLIS, JR., *D. C.*

Executed the within summons November 26th, 1910 by delivering a true copy hereof to John J. Craig the Mayor and highest officer of the City of Covington, Nov. 22nd. 1910 and a true copy hereof to Henry C. Schuler, Chief of Police of the city of Covington, Nov. 22nd. 1910 and a true copy hereof to John J. Craig the Mayor
15 of the City of Covington Nov. 26-1910.

J. T. BOSKE, *S. K. C.,*
By HY. KLAINÉ, *D. S.,*
JOHN DARENKAMP, *D. S.*

Plff's Mo. for Temporary Inj.

At a sitting of said Court on Dec. 2nd. 1910:

"Came plaintiff and filed in open court motion for a temporary injunction herein and the Court hearing the arguments in part, the application for a temporary injunction is continued to December 3rd. 1910 at 10 o'clock A. M."

Said motion is as follows:—

Motion.

Now comes the plaintiff and moves the court for a temporary injunction in accordance with the prayer of the petition herein, for the reason that unless enjoined the defendants will attempt to enforce against this plaintiff the ordinance set forth in the petition by the arrest of its employes while in the operation of its cars and their punishment, and for the further reason that an attempt on the part of this plaintiff to comply with the same would result in disorder upon its cars, altercations with the passengers and claims or suits for damages against it, and because the enforcement of said ordinance or compliance with the same would produce great and irreparable injury to the plaintiff in the manner set forth in the petition herein and the affidavits filed in support hereof.

ERNST, CASSATT & COTTLE,

Attorney for Plaintiff.

Pl'ff Filed Aff'd't J. C. Ernst, Also Aff'd't Thos. Green, Also Aff'd't Geo. M. Abbott.

At a sitting of said Court on Dec. 3rd. 1910:

"Came the plaintiff, and filed the affidavit of J. C. Ernst, also filed the affidavit of Thomas J. Green and also the affidavit of Geo. M. Abbott.

16 The Court hearing the evidence and arguments in part on the motion for a temporary injunction, the further hearing of said motion is continued until December 7th. 1910 and the restraining order is continued in full force and effect until December 12th. 1910, unless the motion for temporary injunction is sooner disposed of".

Said affidavit is as follows:—

Aff'd't J. C. Ernst.

STATE OF KENTUCKY,

County of Kenton, ss:

James C. Ernst being first duly sworn says, that he is President of the South Covington and Cincinnati Street Railway Company, the plaintiff herein, and has been its president and in its active management since about the 1st. day of January 1897, that the said South Covington and Cincinnati Street Railway Company operates the Street Railway System whose cars traverse the streets of the City of Covington; that as set forth in the petition the lines of said street Railway so operated are principally engaged in the carriage of passengers between Newport, Covington, West Covington, Ludlow and adjacent territory, on the one hand, to the City of Cincinnati on the other, and back again; that none of the cars of said Company operate solely within the City of Covington, but that every car except two passing over and upon the streets of said City passes either to or from the City of Cincinnati, and that about ninety (90%) per cent of

the passengers carried upon said cars are traveling either to or from the City of Cincinnati.

17 That said cars are operated in Cincinnati over Walnut Fifth and Vine Streets and through what is known as Fountain Square; that they could not be operated over any other streets under the existing ordinance of the City of Cincinnati; that a portion of said route in Cincinnati is upon tracks belonging to and used by the Cincinnati Traction Company, which operates all of the street cars in the City of Cincinnati, and that the tracks thereon are used jointly by this Company and said Cincinnati Traction Company.

That the largest proportion of the business of this Company consists in taking people who are resident in the City of Covington to their places of business in Cincinnati between the hours of 5:30 and 8:30 in the morning, and carrying them back to their homes between the hours of 5:30 and 6:00 in the evening; also carrying them from Covington in the evening between 7:00 and 8:00 o'clock to places of amusement in Cincinnati, and carrying them back to their homes when such places of amusement have closed.

That in handling that traffic the entire number of people to be carried require and demand carriage at practically the same time, and that considering said regular traffic alone it would be impossible to furnish and to propel over the tracks open to said cars in the City of Cincinnati a sufficient number of cars to comply with the ordinance set forth in the petition.

Affiant further says that the amount of travel, not only at the hours mentioned but at other times in the day, is subject to substantial and sudden variations impossible to estimate in advance, resulting from parades, festivals, special popularity of certain amusements in the City of Cincinnati race meetings at Latonia, Kentucky, entertainments at the Lagoon at Ludlow, Kentucky, conditions of weather, and other special circumstances; that it is impossible for the Company to accurately forecast or provide for such variations, even if its track facilities in the City would accommodate the necessary number of cars and said tracks were always free from obstruction.

Affiant further says that in the operation of said cars delays may be occasioned by unavoidable accidents to the cars, the machinery or the electrical supply of the plaintiff or by the breaking down of wagons upon the tracks in Covington or in Cincinnati, or elsewhere, or by the cessation of current or the obstruction of or accidents to cars of the Cincinnati Traction Company in the City of Cincinnati, and that its ability to get cars through the City of Cincinnati is dependent not only upon such conditions, but upon the number of cars operated over the Cincinnati tracks by the Cincinnati Traction Company or by blockades or other special conditions affecting said Cincinnati Traction Company; that any such special conditions immediately affect the ability of this plaintiff to furnish the number of cars necessary to supply all demands made upon them at the rush hours set forth or under the special conditions above described.

Affiant says that because of the facts hereinabove set forth, it would be a physical impossibility for it to run and operate cars in sufficient

numbers at all times to accommodate the public as required in said ordinance set forth in the petition.

Affiant says that the limit placed upon passengers who may stand within the cars to one-third of the number for whom seats are provided is an unreasonable limit, for the reason that at said rush hours a much larger number of passengers demand to be so carried from and through the City of Covington to the City of Cincinnati, and from the City of Cincinnati to and through the City of Covington, and that a substantially greater number than prescribed in said ordinance could be carried in the interior of said cars without interfering with the health, safety or comfort of each other.

That said ordinance having placed no limit upon the number of passengers to be carried upon the car as a whole, including the platform, would not warrant or protect plaintiff in excluding passengers from the cars at said rush hours, and that when passengers have once gotten upon the platform of said cars engaged in said travel, as aforesaid, it would not be practicable or lawful to prevent said passengers from going from the platform into the car merely because there were standing within the car one-third of the number of people for whom seats were provided therein.

Affiant says that he has been in the Street Railroad business for more than thirteen years; that he is familiar with conditions which prevail in other cities at the rush hours of the day; that he believes that there is no city in the country of anywhere near the size of the City of Covington, and where the conditions as to the course of travel are similar to those in said city, where it has been found possible by any means to obviate the crowding of street cars in the rush hours of the morning and evening.

Affiant says that the plaintiff has in use during said rush hours all of its cars and all of the cars which it can get through the City of

Cincinnati under the conditions above described, but that if it were possible to comply with said ordinance by putting on more cars during said rush hours it would be impossible for this plaintiff to construct, or have constructed for it, such cars in a less period than five months.

Affiant says that upon the passage of said ordinance, the plaintiff took up the subject of providing railings for the platforms of said cars as called for by said ordinance; that the use of said railings upon the front platforms of said cars would, owing to the size of said platforms and the doors upon the entrance thereto virtually prevent the carriage of any passengers upon the front platform; that so far as the rear platforms are concerned, plaintiff has several styles of cars and a railing has to be devised for each of said styles; that to do so much time has been required in planning the same and experimenting thereon; and that because thereof, and because of the time required to obtain said railings and to put them on said cars, it would be impossible to equip said cars with the same in a less period than from thirty (30) to sixty (60) days from the date of this affidavit.

Affiant says that he is informed and therefore believes and avers, that it is the purpose of the defendants, unless enjoined by this Court pending the determination of this cause to arrest the Motorman and

Conductor or both, on every car of this Company operated through the City of Covington which is operated in violation of said ordinance, and every day it is so operated; that it is impossible, as aforesaid, for the plaintiff to comply with said ordinance, and that the attempted enforcement thereof would therefore result in obstruction to travel by taking said Motormen and Conductors from their cars while engaged in the operation thereof, and would be a great injury to the comfort and business of the traveling public, and

21 would result in public disorder; that it would cause irreparable damage to this plaintiff in the loss of fares in the demoralization of its business, in causing its men to leave its employ, and in causing it to pay large and oppressive penalties for said violations. That any attempt on the part of this plaintiff to exclude people from its cars, or to eject them therefrom because of the limit set by said ordinance of the number of people to be carried therein, would result in altercations and disorder upon its cars, and claims for damages against the Company, that this ordinance would be no protection to the Company against judgments upon said claims or actions, and that this Company would be put to great expense in the defense of said claims and actions.

Affiant says that this plaintiff would incur irreparable loss and damage by the attempted enforcement of said ordinance or an attempt to comply therewith pending the determination by this Court of its validity.

JAMES C. ERNST.

Sworn to before me and subscribed in my presence this 3rd day of December, 1910.

[SEAL.]

A. A. HERMES,

Notary Public in and for Kenton Co., Ky.

My commission expires Feb. 15, 1912.

22 Said affidavit is as follows:

STATE OF OHIO,

County of Hamilton, ss:

Thomas J. Green, being duly sworn, says that he is the Superintendent of Transportation of the South Covington & Cincinnati Street Railway Co.; that he has been in the employ of said company for 23 years; that for 2 years he drove a horse car, for 4 years was a motorman in the employ of said company operating cars on its lines between the City of Cincinnati, Ohio, and the City of Covington, Kentucky; that for 13 years he was inspector, whose duty it was to stand at the corner of Fourth & Walnut, or Fifth & Walnut Streets in the City of Cincinnati during the rush hours of every day, to assist in the handling of the cars and in facilitating their progress through Cincinnati, that he has been for 3 years the Superintendent of Transportation as aforesaid and is familiar with the conditions which now prevail in Cincinnati and Covington affecting the carriage of passengers on the lines of the plaintiff and the operation of its cars.

Affiant says that between the hours of 5:30 and 8:30 in the morning, plaintiff is called upon to carry from and through the City of Covington to the City of Cincinnati, practically all of the portion of the population of Covington engaged in the transaction of business in Cincinnati, and that the same people return from Cincinnati to their homes in Covington and beyond, between the hours of five and six o'clock in the evening.

Affiant says that the plaintiff's cars going from Covington to Cincinnati pass over Walnut, Fifth and Vine Sts., returning to the

Suspension Bridge, and that in so doing they use jointly with 22½ the Cincinnati Traction Co., the tracks of said Cincinnati

Traction Co. on said streets north of Fourth and especially through Fountain Square on Fifth Streets. That all of the lines of said company going to and from Covington to Cincinnati pass over the Suspension Bridge, the only bridge having facilities for the passage of street cars between Covington and Cincinnati and all pass over Court Ave. from Suspension Bridge in Covington to Third St. and Park Place, distant one and two blocks respectively. That said cars have regular stops on Walnut, Fifth and Vine Streets in the City of Cincinnati and at Third St., in the City of Covington where it is necessary for them to stop, especially during the rush hours of the morning and evening as above set forth, and that all lines have regular stops at one or more other points on their lines in the City of Covington, where it is on all trips necessary for them to stop by reason of crossings or the regular demands of travel.

That at said stops, especially in Cincinnati, during the rush hours in the evening and in Covington during the rush hours in the morning, there are always large numbers of people waiting to take said cars and that they are in such numbers and get on the cars with such haste and eagerness that it would be impracticable and in many cases impossible to restrain them from getting on as long as there was sufficient room in the car or on the platform to permit their presence and it would be impracticable, and in many cases impossible owing to the crowds, for the conductor of the car to keep a count of the number of passengers thereon and to stop the boarding of said car when any particular number had been reached; that many passengers board said cars while they are in motion; moving slowly to or from the said regular stops, and that nothing but violence or a gate would prevent them from getting on said cars.

23 Affiant further says that when passengers have once boarded the rear platform it would be impossible for the conductor, having to collect fares and perform other duties on said car, to keep a close watch upon or to regulate the passage of persons on the back platform to the interior of the car, especially in case of sudden storm or bad weather.

Affiant further says, from his observation for many years that the number of passengers taking said cars at said rush hours and during the evening hours varies substantially from day to day, owing to the condition of the weather, special occasions such as parades, festivals, special entertainments, etc., and that it would be impossible to forecast or to accurately provide for the number of

people who would desire to ride between Cincinnati and Covington or points beyond at any hour of any day.

Affiant further says, from his observations in the City of Cincinnati, that it would be impossible on any working day to get through the City of Cincinnati on the lines of the plaintiffs number of cars sufficient to accommodate the public in accordance with the provisions of the Ordinance set forth in the petition during the rush hours, and that compliance with said ordinance would be further prevented on special occasions by unusual crowds, obstructions upon the track, obstructions occasioned by the cars of the Cincinnati Traction Co., using the same tracks, failure of electric current and other unavoidable conditions.

THOMAS J. GREEN.

Sworn to before me and subscribed in my presence this 2nd day of December, 1910.

GEORGE STUGARD,

Notary Public in and for said County and State.

24 STATE OF OHIO,
County of Hamilton, ss:

George M. Abbott, being duly sworn, says that he is a resident of the City of Covington and has been for 45 years; that commencing with the year 1875 and from that year up to the year 1907, he was in the employ of and connected with the South Covington & Cincinnati Street Railway Co., and its predecessors in the street railway business in the City of Covington; that from the year 1882 until the year 1907 he was the Secretary and Treasurer of said lines; that he is now engaged in business in the City of Cincinnati as Secretary of the C. N. & C. Light & Traction Co. and has occasion to ride every day between the City of Covington and the City of Cincinnati on the cars of the plaintiff company.

Affiant says that from the time of his first connection with the said company or its predecessors, the principal business of said company was the carrying of passengers between the cities of Covington and Cincinnati; that from the time of his first connection with said lines cars were operated thereon from points in and beyond the City of Covington to Fountain Square in the City of Cincinnati; that the principal object of the original construction and promotion of said lines was the carriage of passengers between Cincinnati and Covington, and more particularly the carriage of the residents of Covington to their places of business in Cincinnati in the morning and back again in the evening; that to the best of his knowledge and belief during said years the number of passengers carried between said cities constituted about from 85 to 90% of the total number carried by said lines; that prior to his connection with said companies
25 as aforesaid and as far back as he can remember, all street car lines operating on the streets of Covington operated cars and carried passengers from Covington to Cincinnati.

GEORGE M. ABBOTT.

Sworn to before me and subscribed in my presence this 2nd day of December, 1910.

[SEAL.]

GEORGE STUGARD,
Notary Public in and for said County & State.

At a sitting of said Court on Dec. 7th, 1910:

"The defendant, filed in open court motion for a subpoena duces tecum, also filed an affidavit, the motion for a subpoena duces tecum is overruled, defendants excepts.

The order submitting this case on the motion for temporary injunction is now set aside, and the further hearing on said motion is continued to December 8th, 1910, at 9 A. M."

Said motion is as follows:

Now comes the defendant and moves the Court that a subpoena duces tecum issue herein commanding James C. Ernst, Polk Laffoon, George M. Abbott and Thomas Green to appear before this court at some time to be fixed by this Court and produce at said hearing all books of account, records and other evidence to be used for and on behalf of this defendant on a motion for temporary injunction herein.

This defendant moves the court to fix a time for the hearing of such testimony for the cross examination of James C. Ernst, Geo. M. Abbott and Thos. Green and the production of said books and records by said witnesses.

JOHN E. SHEPARD,
City Solicitor for Defendant City of Covington.

26

Said affidavit is as follows:

Affiant John E. Shepard, being duly sworn, says that he is City Solicitor for the City of Covington; that he has endeavored to secure information from which to prepare affidavits to be filed on behalf of this defendant on the hearing of the motion for temporary injunction but the information required by this defendant is in the possession of the plaintiff company and is a matter of record now in possession of said plaintiff company.

This affiant says that he can not secure affidavits which will show the facts upon which the defendant relies. This affiant says that the only way that the information and facts required on behalf of the defendant may be obtained is by an oral hearing and the production of the books and records of said plaintiff company.

JNO. E. SHEPARD.

Sworn to before me and subscribed in my presence this 7th day of December, 1910.

[SEAL.]

EDW. W. PFLUEGER,
Notary Public, Kenton Co., Ky.

My commission expires Jan. 3, 1912.

At a sitting of said Court on Dec. 8th, 1910:

"The Court hearing the evidence offered, on the motion for a

temporary injunction, the defendant filed an affidavit and the motion for a temporary injunction is now submitted."

27 Said affidavit is as follows:

Alliant being duly sworn says that the plaintiff herein operates all the street cars operated within the City of Covington; that all of the times of cars operated by said plaintiff company converge and meet at the corner of Third and Court Avenues in the City of Covington; that from this intersection the cars of said company are operated northwardly along Court Avenue across the Suspension Bridge to Second Street in the City of Cincinnati, eastwardly along Second Street to Walnut Street and thence northwardly on Walnut street to Fifth Street and westwardly on Fifth Street to Vine Street; thence south to Second Street and thence Eastwardly on Second Street to the aforesaid Bridge and said Court Avenue. All of said traffic is conducted over said line of track, all north bound traffic going on the east track and returning on the west track.

Alliant says that the greater congestion of traffic in the City of Cincinnati is on Walnut Street between Fourth and Fifth Streets; that the plaintiff company not only operates all cars from the City of Covington along said line but also all cars operated by the plaintiff company in the cities of Newport, Bellevue and Dayton and the towns of Fort Thomas Southgate, Clifton Heights and other suburbs and towns adjacent to the City of Newport, with the aggregate population of fifty thousand; that this plaintiff company operates all the cars from the City of Newport and Campbell County as well as from the City of Covington, converging all of them upon the one single track on Walnut Street between Fourth and Fifth Streets in the City of Cincinnati.

28 Alliant says that the plaintiff company operating one line of cars known as the Fort Mitchell line, which extends entirely through the City of Covington and for a distance of four or five miles into Kenton County beyond the corporate limits of the City of Covington, through the town of Fort Mitchell and along the turnpike known as the Lexington Pike to within a short distance of the town of Erlanger; that the plaintiff company transports many hundred- and thousand- of passengers on said line who are not residents of the City of Covington and who do not disembark from said cars in the City of Covington at all but are transported from the City of Cincinnati through the City of Covington to points in the territory above described beyond the City of Covington.

Alliant says that the plaintiff company operates a line of cars known as the Ludlow cars which go through the northern edge of the City of Covington along the Ohio River to the cities of West Covington and Ludlow, which cities have an aggregate population of several thousand; that said company transports many hundred- and thousands of passengers on said line through the City of Covington from points in the City of Cincinnati to points within the cities of West Covington and Ludlow, which passengers do not disembark from said cars in the City of Covington.

Alliant says that plaintiff company operates a line of cars known as the Newport and Covington line, which line of cars are operated

from the City of Newport through the City of Covington into the City of Cincinnati; that said company transports many hundreds and thousands of passengers over said line from Newport through the City of Covington to the City of Cincinnati, which passengers do not disembark in the City of Covington.

29 Affiant says that all of said lines of cars to-wit: the Fort Mitchell, the Ludlow and the Newport lines converge at Third and Court Avenues in the City of Covington and are operated over the line of track above described, together with all other cars operated by the plaintiff company in the City of Covington.

Affiant says that this plaintiff company has operated cars over the Suspension Bridge and the route above described in the same manner for more than twenty years last past; that the plaintiff company has no other or greater terminal facilities for traffic in the City of Cincinnati at the present time than it had twenty years ago notwithstanding the population of Campbell and Kenton Counties and the cities and towns therein has increased many thousand and the lines of the plaintiff company has been extended into territory wholly without street car accommodations until within the last seven or eight years.

Affiant says that the cars of the plaintiff company are practically of uniform size; that there are two styles of seats in said cars, one class of cars having sixteen double seats placed on either side of and at right angles to an aisle in the center of the cars providing seats for thirty-two passengers, the other class of cars have single seats placed against both side walls of the car, extending the entire length thereof and providing seats for 26 passengers.

Affiant says that under the provisions of the ordinance attacked in this proceeding plaintiff is allowed to carry inside the car one and one-third the seating capacity of such car, which in the case of

cars having cross seats would permit forty-three passengers and in the case of cars having seats on the side would permit 35 passengers. Affiant says that a greater number of passengers cannot with comfort or safety be carried inside said cars. Affiant says that said cars were not designed and are not large enough to carry greater number of passengers than sixty, that is forty-three on the inside of the car and seventeen upon the platform thereof; that said platform will not accommodate with safety or any comfort at all a greater number than seventeen.

Affiant says that notwithstanding the capacity of these cars as aforesaid plaintiff company has every day of the year with the possible exception of Sundays and for many years continuously last past, by reason of its failure to provide and operate sufficient equipment to properly accommodate the public, operated the cars owned by it, in a crowded and unsafe condition, carrying passengers far in excess of the capacity of the cars, and frequently carrying on said cars more than one hundred passengers.

JNO. E. SHEPARD.

Sworn to before me and subscribed in my presence this 8th day of December, 1910.

EDWARD W. PFLUEGER,
Notary Public, Kenton County, Kentucky.

31 At a sitting of said Court on Dec. 12th, 1910:
 "The Court filed an Opinion."

The defendant the City of Covington, John J. Craig, Mayor and Henry C. Schuler, and each of them, are hereby enjoined and restrained, until the further order of the court, from enforcing in any manner, against the plaintiff South Covington & Cincinnati Street Railway Company, the ordinance approved October 24th, 1910, regulating the operation of street cars in the City of Covington. This order shall take effect upon the execution of a bond, conditioned as provided by law, in the sum of \$1,000.00.

Said bond is as follows:

We undertake that the plaintiff shall pay to the defendant the damages not exceeding \$1,000.00 which it may sustain by reason of the restraining order in this action, if it be finally decided that the same ought not to have been granted.

Witness our hands this 12th day of December, 1910.

NATIONAL SURETY COMPANY,

By S. W. FERRIS, *Att'y-in-Fact.*

Attest:

BEN MACKE, *Clerk.*

At a sitting of said Court on Dec. 12th, 1910:

"The defendant filed in Clerk's office Special Demurrer to petition."

Said Special Demurrer is as follows:

Now comes the defendant, City of Covington and demurs specially to the petition in equity herein for the reason that the Court has no jurisdiction of the subject matter of this action.

JNO. E. SHEPARD,

City Solicitor for Defendant City of Covington.

ERNST, CASSATT & COTTLE, *Contra.*

At a sitting of said Court on Jan. 9th, 1911:

"The special demurrer to the petition is continued."

At a sitting of said Court on Jan. 16th, 1911:

"The special demurrer to petition overruled, the defendant excepts."

At a sitting of said Court on Jan. 17th, 1911:

"The defendant filed in Clerk's office, a General Demurrer to the petition."

Said demurrer is as follows:

Now comes the defendant, City of Covington, and demurs generally to the petition herein, for the reason that same does not state facts sufficient to constitute a cause of action against this defendant.

JNO. E. SHEPARD,

City Solicitor for Defendant City of Covington.

ERNST, CASSATT & COTTLE, *Contra.*

33

At a sitting of said Court on Jan. 23rd, 1911:

"The general demurrer to the petition is set for hearing February 22nd, 1911."

At a sitting of said Court on Mar. 6th, 1911:

"The demurrer to the petition is overruled, to which the defendant excepts."

At a sitting of said Court on Mar. 15th, 1911:

"The defendant filed in Clerk's office its answer."

Said answer is as follows:—

Now comes the defendant, City of Covington, and for answer to the petition herein denies that the plaintiff herein is engaged in the carriage of passengers for hire over its lines of street railway from the City of Covington and other municipalities and territory into the City of Cincinnati, Ohio or from the City of Cincinnati, Ohio into said territory or municipalities; denies that the plaintiff is engaged in the carriage of passengers from the City of Newport through the City of Covington into the City of Cincinnati, Ohio.

Defendant denies that about ninety per cent of the passengers carried by plaintiff on or over the streets of Covington are passengers whom plaintiff has undertaken to carry or is in the act of carrying from the municipalities of Newport Ludlow, West Covington and Covington or territory contiguous thereto, to the City of Cincinnati, Ohio, or from the City of Cincinnati, Ohio, to said municipalities or territory. Denies that none of the cars of said plaintiff Company operates solely within the City of Covington or that every car
34 of said plaintiff except two which passes over or upon the streets of this defendant City, passes either to or from the City of Cincinnati.

This defendant denies that the number of people carried by the plaintiff Company varies in the material or substantial degree from day to day owing to the state of the weather or otherwise.

This defendant denies that the ordinance set out in the petition is void or of no effect; denies that said ordinance is void or of no effect because the City Council of the city of Covington had no power under its charter to pass same; denies that said ordinance is void or of no effect because said ordinance embraces more subjects than one, which subjects are not expressed in the title thereof; denies that said ordinance is void or of no effect because it is an unreasonable or unlawful regulation of the business of the plaintiff.

Defendant denies that said street cars of the said plaintiff Company will carry without danger to person or health or with comfort a greater number of passengers than are permitted by said ordinance to be carried thereon.

Defendant denies that it is impossible for the plaintiff to control to the requirements of said ordinance the number of passengers riding upon its cars; denies that in the morning hours or in the evening hours the plaintiff could not within the exercise of force limit the number of passengers to be carried by it upon its cars as provided in said ordinance.

Defendant denies that plaintiff is without power or right to exclude intending passengers from its cars in the City of Cincinnati, 341-2 Ohio, bound for said places in the State of Kentucky or from said places in the State of Kentucky bound for said City of Cincinnati.

Defendant denies that plaintiff is without powers or right to eject from its cars when reaching the City of Covington, passengers who lawfully took passage thereon outside of the City of Covington until said passengers have reached their destination; denies that plaintiff is without power or right to exclude from its cars intending passengers in the territory or municipalities outside the City of Covington or in the State of Kentucky merely because said cars may respectively contain more than the number of passengers set forth in said ordinance; denies that plaintiff is without power to eject from said cars within the City of Covington or before they have reached their destination, passengers who have lawfully taken passage on said cars in said municipalities or territory outside the City of Covington.

Defendant denies that any attempt on the part of the said Company to exclude intending passengers or eject actual passengers from its cars in order to comply with said ordinance would result in disorder on said cars or physical injury to its employees or passengers or law-suits for damages against the plaintiff.

Defendant denies that in any or all the cases referred to in the petition or in any prosecutions for the violation of said ordinance, the exact number of people within the car in question at the time in question or the exact number of people permitted to ride within said car would not be susceptible of definite proof; denies that there or otherwise said ordinance is void for uncertainty.

Defendant denies that the question *and* whether there is reasonable room on a street car which a passenger attempts to board and 35 whether he has the right to board same or whether it is the right or duty of the Company operating same to receive such passenger depends upon circumstances or conditions which vary from time to time, the hour of the day, the state of the weather, the age or condition of said person or otherwise; denies that said ordinance is unreasonable or void because it is an attempt to arbitrarily obstruct or limit the right or duty of the plaintiff or the passengers upon the cars of said Company; denies that said ordinance takes no account of the special conditions or circumstances warranting an exception.

Defendant denies that it is impossible for the plaintiff to propel or operate over said bridge or over or upon the streets in the City of Cincinnati necessary to pass through Fountain Square a sufficient number of cars to accommodate the public in the rush hours of the morning or evening as set out in the petition at the rate prescribed in the ordinance.

Defendant denies that there is no street railroad line in the United States in as populous community as that served by this Company that has been able at the rush hours of the day when people are either going to or from their work, to prevent its cars from being at times over-crowded to a degree which would be a violation of said ordinance.

Defendant denies that the provision of said ordinance requiring under penalty that the temperature of its cars shall never be permitted to be below 50 degrees Fahrenheit is unreasonable, arbitrary or oppressive.

Defendant denies that the plaintiff's cars are fitted with the most approved or efficient heaters which are obtainable for said purpose or that said heaters are kept in operation at all times when passengers desire or their comfort requires denies that it is impossible with the constant opening or closing of doors rendered necessary by the business of said Company or the varying tastes among the passengers as to the degree of ventilation or the sudden changes in the weather to insure that any specific degree of temperature be maintained.

Defendant denies that plaintiff exercises the utmost care to keep its cars thoroughly cleaned or ventilated; denies that the requirements of the said ordinance that each car be fumigated once a week is an unreasonable, unnecessary or oppressive requirement.

Defendant denies that said ordinance is arbitrary, unreasonable or void because same became effective within thirty days from and after its passage; denies that it was impossible for plaintiff within said period to equip its cars with railings as required by said ordinance.

Defendant denies that it has at all times during the rush hours of the day operated all of the cars in its possession available for such purpose; denies that it was impossible for plaintiff to obtain any new or additional cars within said period of thirty days after the approval of said ordinance.

Defendant denies that on October 7, 1892 or at any other time an ordinance was passed by the Council or approved by the Mayor of the City of Covington which constituted, became or now is a contract between the plaintiff and the City of Covington, precluding said City from requiring the plaintiff to run a greater number of cars or more frequently than provided in said ordinance.

Defendant denies that the ordinance of October 24-1910 or the provisions thereof are in conflict with or an impairment of the obligations of any contract existing between the plaintiff and the City of Covington in violation of Article 1, section 10 of the Constitution of the United States or otherwise.

Defendant denies that for any of the reasons set out in the petition said ordinance is an unlawful or unreasonable interference with or regulation of interstate commerce or is in violation of Article 1, section 8 of the Constitution of the United States.

Defendant denies that for any of the reasons set out in the petition or otherwise said ordinance deprives plaintiff of the property without due process of law in violation of Section 1 of the Fourteenth Amendment of the United States Constitution, or deprives plaintiff of its property at all.

Wherefore having answered this defendant prays that the petition herein be dismissed, that the temporary injunction herein be dissolved, that the permanent injunction prayed for be denied, for its

costs herein and for all relief to which this defendant is entitled in law or in equity.

JNO. E. SHEPARD,
City Solicitor for Defendant City of Covington.

STATE OF KENTUCKY,
County of Kenton:

John J. Craig, being duly sworn says that he is Mayor of the City of Covington and that the allegations in the foregoing answer are true.

JNO. J. CRAIG.

Sworn to before me and subscribed in my presence this 15th day of March 1911.

JNO. E. SHEPARD.

38 At a sitting of said Court dated on Apr. 11th, 1911:
"The defendant filed in Clerk's office motion to submit for judgment and for judgment dismissing petition and injunction."
Said motion is as follows:

Now comes the defendant, City of Covington, and moves the Court to submit this cause for judgment and for judgment dismissing the petition and injunction herein.

JNO. E. SHEPARD,
City Solicitor for Defendant City of Covington.

At a sitting of said Court on Apr. 17th, 1911:
"The motion to submit for judgment and for judgment dismissing petition and injunction is continued."

At a sitting of said Court on Apr. 24th, 1911:
"The defendant's motion to submit for judgment and for judgment dismissing petition and injunction is withdrawn."

At a sitting of said Court on June 19th, 1911:
"The defendant filed in Clerk's office a motion to submit for judgment."

Said motion is as follows:

Now comes the defendant and moves the Court to submit this cause for judgment and for judgment.

JNO. E. SHEPARD,
City Solicitor for Def't.

ERNST, CASSATT & COTTLE, *Contra.*

39 At a sitting of said Court on June 26th, 1911:
"The motion to submit for judgment is continued to June 28th, 1911".

At a sitting of said Court on June 30th, 1911:

"The Notary Public filed in Clerk's office three batches of depositions for plaintiff".

At a sitting of said Court on July 3rd, 1911:

"The amendment to the petition is offered by the plaintiff to the filing of which the defendant objects. The objection is overruled, the amendment to the petition is filed and defendant excepts. By consent, the allegations of the amendment to the petition are traversed of record.

The original deposition of Thomas J. Green is filed, and the exhibits to the deposition of W. H. Horton are hereby separately filed. By consent, all objections to the depositions on file (excepting as to the competency and relevancy) are waived.

By consent, the Certificate of the Census Bureau (showing population of Kenton and Campbell Counties and certain places situated in said counties) is hereby filed and made part of the record.

This cause to stand submitted Tuesday July 25, 1911".

40 Said amended petition is as follows:—

Now comes the plaintiff and for amendment to its petition alleges:

The ordinance set forth in the petition was passed by the City Council of the City of Covington without giving any opportunity to the plaintiff company which is the only company affected thereby, to be heard, although plaintiff, by its President, requested said hearing of each branch of said City Council, each of which failed and refused to grant the same.

Plaintiff further alleges that the route over which it operates its Covington cars in the City of Cincinnati is the only route over which it had any right to operate, or has been able to obtain the right to operate, and that there is no other route available in the City of Cincinnati over which its said cars could operate.

Plaintiff further says that in the operation of its lines in the City of Covington, the number of people desiring or demanding passage thereon, varies in a material degree from day to day, owing to the state of the weather, the desires or necessities of said passengers and otherwise; that the course of travel varies from day to day and that demands for special occasions, such as the meetings at the Latonia Race Track, entertainments at the Lagoon, special theatrical or musical festivals, funerals and other special occasions, vary to such a degree from day to day, and especially upon Saturdays, Sundays and holidays other than those specifically mentioned in the ordinance, that it is impossible for plaintiff to forecast and provide for the travel on any of its lines, so as to provide at all times a sufficient

41 number of cars on its lines in the City of Covington to comply with the terms of said ordinance, *a sufficient number of cars to comply with said ordinance.*

The cars in use upon plaintiff's railway are of different sizes and different types and the ratio of floor area to the seating capacity varies in the different types of cars and according to the seating arrangements. The requirements of said ordinance limiting the number of passengers permitted to stand within the cars to a definite

fraction of the number for whom seats are provided is for said reason arbitrary and unreasonable, and for the further reason that in each of said types of cars a greater number of passengers than that permitted by said ordinances can be accommodated and carried without danger to health, order or comfort.

The plaintiff company is duly authorized by its charter to engage in the business of carrying passengers between the cities of Covington and Newport in the State of Kentucky for many years has been such interstate carriage; the City of Covington has at all times consented thereto and acquiesced therein and has specially permitted and provided for the same by the said ordinance of October 7, 1892.

Under the authority aforesaid the plaintiff was, at the time of the passage of the ordinance complained of in the petition, for many years prior thereto and ever since, regularly engaged in the carriage of passengers from the State of Kentucky to the State of Ohio, and from the State of Ohio to the State of Kentucky.

Said ordinance so complained of in said petition directly affects, applies to and interferes with the said carriage of passengers between said states and imposes conditions and requirements thereon which are unreasonable, oppressive and in many cases impossible of performance, all in the manner alleged in the petition and this

42 amended petition and otherwise.

Plaintiff claims the protection and benefit of Article 1 Section 10 of the Constitution of the United States against the impairment of the obligation of its contract set forth in said ordinance of October 24, 1910, and of Section 1 of the 14th Amendment of the Constitution of the United States against the deprivation of its property without due process of law all as particularly set forth in the petition and this amended petition.

Wherefore plaintiff prays as in its original petition.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff.

STATE OF KENTUCKY,
County of Kenton, ss:

DEPARTMENT OF COMMERCE AND LABOR,
BUREAU OF THE CENSUS,
WASHINGTON, *January 3, 1911.*

Mr. John J. Craig, Mayor, Covington, Ky.

SIR: Referring to your letter of December 1, I beg to inclose herewith an official certificate covering the population of Kenton and Campbell Counties, Kentucky, and of certain places situated in said counties.

There is also inclosed a statement showing the population of the counties and places in question as shown by the returns of the Twelfth Census.

Very respectfully,

E. DANA DURAND.

Inclosures.

43 Place.

Population 1910.

Kentucky:

Campbell County: Fifty-nine Thousand, three hundred, sixty nine (59,369).

Bellevue City, Campbell County, Six thousand, six hundred eighty-three (6,683).

Dayton City, Campbell County; Six thousand, nine hundred seventy-nine (6,979).

Newport City, Campbell County; Thirty thousand, three hundred nine (30,309).

Southgate village, Campbell County, Six hundred twenty-seven (627).

Kenton County: Seventy thousand, three hundred, fifty-five (70,355).

Bromley town, Kenton county, Eight hundred, nineteen (819).

Covington, city, Kenton county, Fifty-three thousand two hundred, seventy (53,270).

Ft. Mitchell town, Kenton county: Eighty (80).

Ludlow town, Kenton County, Four thousand, one hundred, sixty three (4,163).

West Covington town, Kenton County, One thousand, seven hundred, fifty-one (1,751).

44

Kentucky:

Population 1900.

Campbell County	54,223
Bellevue city, Campbell County.....	6,332
Dayton city, Campbell county.....	6,104
Newport city, Campbell county.....	28,301
Southgate, village, Campbell county.....	...
Kenton County	63,591
Bromley town, Kenton county.....	543
Covington, city, Kenton county.....	42,938
Ft. Mitchell, town, Kenton county.....	...
Ludlow town, Kenton county.....	3,334
West Covington town, Kenton county.....	1,606

45

At a sitting of said Court on Aug. 7th, 1911:

"The court filed an Opinion herein".

It is adjudged that the temporary injunction, herein be dissolved; that the plaintiff's petition be dismissed, and that the defendant recover of the plaintiff its costs herein to all of which the plaintiff excepts and prays an appeal to the Court of Appeals, which is granted.

Plaintiff moves for an order continuing the injunction heretofore granted herein, pending the appeal, said motion is overruled, plaintiff excepts.

Upon the request of plaintiff the Court ordered that status existing in this cause immediately before the entry of the judgment entered and appealed from shall be maintained and the defendants

enjoined as in the order of Injunction hereinbefore entered pending an application of the plaintiff to the Court of Appeals or a Judge thereof to continue the Injunction, but not exceeding 20 days from the entry thereof".

46 Filed June 30th.

The deposition of Thos. J. Green, taken before Arnold Hermes, a Notary Public for Kenton County, Kentucky, on behalf of plaintiff at the office of the plaintiff, in Covington, Kentucky on the 27th day of April 1911, pursuant to stipulation; It is agreed that the deposition may be taken in short-hand and transcribed by the Stenographer, and that the transcript may be used by the plaintiff in the above styled case, subject to exceptions by either party as to relevancy or competency.

Present on behalf of Plaintiff, Hon. Alfred B. Cassatt:

Present on behalf of the defendant, Hon. John E. Shepard City Solicitor.

The witness being first duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. CASSATT:

Q. Mr. Green, state your full name?

A. Thos. J. Green.

Q. What is your age?

A. 44 years old.

Q. Where do you reside?

A. # 2004 Scott St., Covington, Ky.

Q. What is your occupation?

A. Supt. of Transportation for South Covington and Cincinnati Street Railway Company.

Q. How long have you occupied that position?

A. About three years.

Q. How long have you been in the employ of the South Covington and Cincinnati Street Railway Company?

47 A. A little over 24 years.

Q. What have been your duties while in its employ taking them in their order from the time you first began to work for the Company?

A. First I was a horse car driver; next a motorman next an Inspector and then Supt. of Transportation.

Q. When you were driver of a horse car, where did the cars go that you drove?

A. To Fountain Square.

Q. Give the route of the cars, generally speaking.

A. I drove on the Madison Avenue line; I run from 16th Street down Madison Avenue to 3rd Street and over 3rd Street to Greenup, down Greenup to 2nd Street and across the bridge to Cincinnati and up Walnut and around Fountain square and back down Vine Street and back across the bridge and up Scott to 4th and over 4th to Madison and up Madison to 16th.

Q. When you first went in the employ of the Company 23 years ago, was the route in Cincinnati which you have described, was it the regular route for all the Covington cars?

A. Yes sir.

Q. As motorman for the South Covington and Cincinnati Street Railway Company, after it put on electric cars, what route did the cars of the company follow?

A. All the first electric cars was run on Madison Avenue.

Q. I mean with reference to their operation between Covington and Cincinnati and particularly over the streets which they operated in Cincinnati?

A. They operated over the same streets in Cincinnati.

48 By Mr. SHEPARD:

Q. The same streets as the horse car lines?

A. Yes sir.

By Mr. CASSATT:

Q. Did all the Covington cars in those days run to Cincinnati and over that route?

A. There were some transfer cars that run here. The Greenup street line wasn't transferred, the cars run up Greenup and down Scott.

Q. I am referring to the electric cars?

A. The electric cars that run to Cincinnati went over the same lines.

Q. Were *they* any electric cars operated in those days that did not go to Cincinnati?

A. When they first started to operate the electric cars they run to the bridge and the horse cars made the trip on over across the bridge.

Q. From the time the electric cars of the South Covington and Cincinnati Street Railway Company started to operate across the Suspension Bridge into Cincinnati, were there any electric cars operated in Covington and which did not go to Cincinnati?

A. No, sir.

Q. Then all the cars, the Covington electric cars, run through Cincinnati over the route which you have described?

A. Yes, sir, except on days when we have heavy travel like at the Lagoon, we run cars around this corner here.

Q. By this corner, what do you mean?

A. The corner here at Third and Court Streets.

Q. In Covington?

49 A. Yes, sir.

Q. How long were you an Inspector?

A. Well, it has been about 15 years since I went in.

Q. What was your duties while you were Inspector?

A. I watched after the operation of the cars.

Q. Where were you situated?

A. All over the lines, principally in Cincinnati for the last three years before I went in as Supt. of Transportation.

Q. For how many years was it your principal duty to remain in Cincinnati watching the operation of the cars there?

A. About 15 years.

Q. At what points in Cincinnati were you stationed?

A. Around the Fountain there, Fifth and Vine and Fifth and Walnut.

Q. State a little more specifically what your duty was at Fifth and Walnut and Fifth and Vine with reference to the operation of the cars of the company?

A. Well, I don't know just how to get at it; my duty was the general supervision of the operation of the cars of the company, it was my duty to keep the cars a going; anything that might delay them; it was my duty to keep them a going as best I could.

Q. Then your duty as such Inspector was directed to getting the cars past the points as rapidly as possible?

A. Yes sir.

Q. Since you have been Supt. of Transportation, what have been your duties?

A. To superintend the running of the cars, and looking after the men.

50 Q. Has it been any portion of your duty in that time to pay any attention to the operation of the cars over in Cincinnati?

A. Yes, sir.

Q. Are there Inspectors in Cincinnati now and have there been since you became Superintendent?

A. Yes, sir.

Q. Under whom are they?

A. Under me.

Q. To whom do they report?

A. To me.

Q. Have you ever had occasion as such Superintendent to be personally present at these points, if so, state when?

A. Well, every evening between five and six o'clock I am over there.

Q. By over there, you mean in Cincinnati?

A. Yes, sir, Cincinnati. At Fourth and Walnut and Fifth and Walnut.

Q. Has that been the case ever since you have been the Supt. of Transportation?

A. Yes, sir.

Q. Directing your attention now particularly to the month of November, 1910, and the period since that time, I will ask you to state in a general way so far as you can the character of the business done by the South Covington and Cincinnati Street Railway Company as to the travel of the passengers—between what points has it been principally?

A. (No answer.)

Q. I will broaden that question so as to make it apply to the last year?

51 A. The travel is principally between Covington and Cincinnati on this division, and between Newport and Cincinnati on the other division.

Q. What has been the principal use made by passengers of the Covington Street cars?

A. They use them to go to and from the City.

Q. From Covington to Cincinnati, and from Cincinnati to Covington.

A. Yes, sir.

Q. State what the facts were with reference to the place of business of the people who live in Covington and who use the Covington street cars?

A. A great number of the people who reside in Covington are in business in Cincinnati, or connected with business firms there; they go over in the morning to their business and back in the evening to their homes.

Q. Are you able to state the proportion of the travel on the Covington lines which is composed of people going to and from Cincinnati.

A. The greater portion of our business goes to and from Cincinnati.

Q. State whether there are any particular hours of the day when this travel is greater than at other hours, by this travel, I mean to and from Cincinnati?

A. The travel to Cincinnati in the morning is the heaviest between 6:30 and 7:00 and 7:30 and 8 o'clock, they are two times when the cars are congested; in the evening coming home the travel is the heaviest between 5:15 and 6:15.

52 Q. Mr. Green, I understood you to say that the Covington cars which go to Cincinnati, go over the Suspension Bridge to 2nd Street, over 2nd to Walnut, up Walnut to 5th and over 5th to Vine and down Vine to 2nd and over 2nd again to the bridge and back to Covington?

A. Yes, sir.

Q. I wish you would state what conditions are met by your cars in the way of delays at various points along that line, commencing where the cars first strike Cincinnati on their way over?

A. There is considerable wagon traffic on 2nd Street that delays the cars and also on Walnut Street.

Q. Take Second Street—for what is Second Street used in the way of travel and other conveyances?

A. Wagons conveying freight from one depot to the other, and it is a general thoroughfare for traffic from one end of the town to the other; the traffic from the Pennsylvania to the Stations in the west end.

Q. What stations in the west end?

A. Big Four, L. & N.; Southern and C. H. & D.

Q. Where is the Cincinnati Southern Station?

A. On Vine Street between Front and Second.

Q. Between Front and Second?

A. Yes, sir.

Q. That is only a half square from 2nd and Vine Sts.

A. Yes, sir.

Q. What other travel is there on 2nd Street with reference particularly to the Suspension Bridge?

A. Practically all the wagons between Covington and Cincinnati use Second Street.

Q. Is there and has there been for the last year and generally speaking in the past few years, much or little wagon travel over Second Street of the character you have mentioned?

A. Considerable.

53 Q. State whether or not that does offer any obstructions to the operation of your cars on Second Street and about how much, is it small or great?

A. We have some delays on Second Street, considerable delays by wagons breaking down and stalling.

Q. Does the wagon traffic ever become congested so as to interfere with the cars?

A. Yes, sir, sometimes we can scarcely get through.

Q. To what extent is that true as to the rush hours in the morning and evening?

A. It isn't so great at the rush hours in the morning and evening as it is in the afternoon between two and four o'clock.

Q. Is there or not a large wagon traffic on that street at the rush hours of the street cars?

A. In the evening there is considerable traffic there; the express wagons and freight wagons.

Q. Second street at the place where your cars operate over, is the sole method of entrance to the Suspension Bridge from Cincinnati?

A. Yes, sir.

Q. Now going up Walnut Street, what is the condition there with reference to wagon traffic?

A. The wagon traffic is quite heavy on Walnut Street and we have some delays both in the morning and in the evening; coal wagons dump coal in the chutes, and market wagons.

Q. What is the grade of Walnut street from Second to Fourth Streets in Cincinnati?

A. It is a heavy grade, but I don't know the exact per cent, but is quite a heavy grade.

54 Q. Do wagons get stalled along there?

A. Yes, sir, and we have considerable trouble with wagons breaking down and with horses falling down, that delays the cars.

Q. Going on up Walnut street, what is the next element which you encounter which interferes with the cars?

A. Well, at Fourth and Walnut we are delayed by cars, automobiles and people passing.

Q. Is the corner of Fourth and Walnut streets a busy corner in the City of Cincinnati?

A. Yes, sir, it is a very busy corner.

Q. What buildings are there at that corner?

A. The Carlisle building, Union Trust Building, First National Bank Building, Mercantile Library Building.

Q. State the character of those buildings, what are they used for?

A. They are office buildings, and are practically filled with office people.

Q. What are the heights of those buildings, are they of the sky-scraper type?

A. Yes, sir, three of them are sky scrapers.

Q. Are there any street car tracks on Fourth street that cross your tracks?

A. Yes, sir, cars run both ways.

Q. Fourth street runs at right angles with Walnut?

A. Yes, sir.

Q. The tracks that you speak of crossing your tracks there, whom do they belong to?

A. Cincinnati Traction Company.

Q. State what lines operate and in which way?

55 A. Going east is the Elbourn Avenue; Third and Fifth East end and Delta Avenue; going west is the Zoo Eden, East end and Delta Avenue and Norwood.

Q. Take the cars which pass along Fourth Street and which belong to the Cincinnati Traction Co., and pass Walnut Street—between the hours of 5:15 and 6:15 in the evening are you able to state about how many of the Cincinnati Traction Company's cars cross your tracks in that period in the evening?

A. At Fourth and Walnut Streets there are 238 cars which cross our tracks east and west, the Cincinnati Traction Company's cars; that is not including our Newport cars.

Q. What do the Newport cars do?

A. They use our tracks, or the same tracks that we do to Fifth and Walnut.

Q. How many of them are there in that same period?

A. I ain't sure, but I think there is 68.

Q. What is your best impression as to the number?

A. I think about 68 cars.

By Mr. SHEPARD: If he finds that he is mistaken he may correct it later on the deposition.

By Mr. CASSATT:

Q. What other obstruction- are there at Fourth and Walnut to the operation of your cars?

A. Automobiles and wagons.

Q. Are there many or few automobiles and wagons at the rush hours?

56 A. It looks like there are more automobiles between five and 6 o'clock in the evening than there is at any other time in the day.

Q. How does that corner compare with other corners in Cincinnati as to the number of wagons and automobiles?

A. I think there is about as many at Fourth and Walnut as there is any place else in the city.

Q. How about the number of people who cross the streets there at those hours?

A. The streets are crowded with people.

Q. Now take Walnut Street from Fourth to Fifth, your cars are the only cars which operate North on that street?

A. Yes, sir, and of course the Newport cars, they operate on that street from Fourth to Fifth.

Q. In cases of accident or fire, or other unusual occurrences, do the Cincinnati Street cars use that track?

A. Yes, sir, if they can't get West on Fourth Street.

Q. They formerly did use it for their cars?

A. In former years the Avondale cars used to run up that way.

Q. Have they not the right to use it now if they want to?

A. So far as I know there is nothing to keep them from it; they use it *whether* they want to, we never question their right to do so.

Q. Take the next obstruction, if any, which is met by your cars, say at Fifth and Walnut Streets, are there any street car tracks which cross your tracks *that* that point?

A. At Fifth and Walnut the track going east on Fifth is used by the Zoo Eden and Norwood cars and they cross diagonally across our lines, that is on the south side of Fifth Street; the cars come east on the south side of the fountain and go east on Fifth Street.

Q. Referring to this track which crosses your tracks is that on the north or south side of Fifth?

A. Rather to the south of the center.

Q. What car lines do you say use them?

A. Zoo Eden and Norwood.

Q. Are there few or many cars that cross your tracks during the rush hours at that point.

A. Considerable cars cross there at the rush hours.

Q. Now what is the next obstruction that you find?

A. Rounding the curve there going into Fifth Street we intersect with the Cincinnati Street cars that run on the north side of the Fountain.

Q. Now before you get to that point, the Newport cars turn east on Fifth Street?

A. Yes, sir.

Q. What corner of Fifth and Walnut is that your cars run over the same tracks with the Cincinnati Street cars?

A. On the northwest corner of Fifth and Walnut.

Q. State what tracks run together there?

A. The tracks that we operate over with the Cincinnati tracks; they have a track coming around the Fountain; *to* other tracks comes into the same track from the north.

Q. Can you state what *our* lines use that track jointly with you on the north side of the Fountain?

A. The Colerain Avenue; Third and Fifth Street; Vine and Norwood; Vine and Clifton; North Norwood, Sedamsville and the Fountain Square car.

58 Q. State how many if you know, about how many cars in the course of an hour, between five and six o'clock, say of the Cincinnati Traction Company use that track in conjunction with your own cars?

A. 245 cars.

Q. Of what company?

A. Cincinnati Traction Company between five and six o'clock in the evening; they pass along on the same track that we pass on.

Q. Is there any wagon travel along on that side of the Fountain?

A. Yes, sir, considerable wagon travel.

Q. Is that a wide or narrow street there?

A. It is narrow on account of the esplanade.

Q. Is there any means for wagons and vehicles to go east, than over that narrow street which is occupied by the street railway tracks, do they have to drive along that narrow street; they have to go over this strip do they?

A. Yes, sir.

Q. What is the situation at the corner of Fifth and Vine with reference to other car tracks, do you encounter any other tracks at Fifth and Vine?

A. Yes, sir, a number of other cars, the Vine and Clifton and Vine and Norwood and Sedamsville cross us there; that we have to run in with.

Q. How do you mean they cross you?

A. They come down Vine and turn east on Fifth on our track; they diagonally cross us there at Fifth and Vine the Sedamsville and Vine and Norwood and Zoo Eden cars have to pull their trolleys down at Fifth and Vine which takes sometime.

Q. How many cars of the Cincinnati traction company between the hours of five and six in the evening regularly cross that crossing, either going along or across the tracks which you cross?

A. 318. I want to state that when I made the affidavit for Mr. Shepard's benefit I left out 29 cars; the Warsaw Avenue.

Q. What is the route of the Warsaw Avenue cars?

A. They run north on Vine; they cross us at Fifth and Vine and go on up Vine.

Q. Are there any other cars affecting the travel at Fifth and Walnut.

A. Well, of course there is at Fifth and Walnut very frequent delays by the Walnut Hills cars coming down Walnut and turning there; that blocks wagons and automobiles and keeps us from turning the curve there; that causes more or less delay.

Q. What about Fifth and Vine?

A. We have the same thing there with the Westwood and Sixth street cars, our cars have to wait until the Sixth street cars get out of the way.

Q. You mean you have to wait while they are on your track to get off on the Sixth street track; or the track on the west side of Vine street?

A. Yes, sir.

Q. Coming down Vine street from Fifth Street to Fourth, what is the character of that street, is it a much traveled street?

60 A. Yes, sir, considerable wagon traffic and a street full of people, people crossing from one side of the street to the other.

Q. How about the number of cars of the Cincinnati Traction

Company crossing your tracks at Fourth and Vine Streets as compared with Fourth and Walnut?

A. At Fourth and Vine there is the same number of cars as there is at Fourth and Walnut with the Warsaw cars added, which would be about 246 cars.

Q. What does the Warsaw Avenue line do at Fourth and Vine?

A. It comes east on Fourth and turn north on Vine.

Q. Does it cross your track?

A. Yes, sir.

Q. Are there any car lines that use your track north on Vine street between Fifth and Fourth?

A. Yes, sir, the John street car line, the Clifton and Elm and the Fountain Square Car.

Q. Are there many or few of them at the rush hour?

A. Considerable number of them.

Q. What is the condition of affairs at Fourth and Vine as regards the travel of vehicles and people?

A. There is a heavy traffic of vehicles and people at Fourth and Vine.

Q. What are the conditions on Vine street from Fourth on down with reference to traffic?

A. About the same traffic on Vine street as on Walnut; the cars have to proceed slowly.

Q. State whether there is from the east and west travel on 3rd Street across your tracks.

61 A. Considerable traffic crosses Third Street East and West.

Q. Mr. Green, state at what points in Cincinnati your cars stop to take on and let off passengers.

A. We make a number of stops in Cincinnati.

Q. At what points?

A. We stop at the Cincinnati end of the bridge and at Second and Walnut, Pearl and Walnut, Mercantile Library Bldg. above Fourth and on the Southeast corner of Fifth and Walnut and the north-west corner of Fifth and Walnut, on Fifth and Vine, in front of the Arcade, between Fourth and Fifth; Fourth and Vine; north of Fourth on Vine and South of Front on Vine and at Third and Vine, at Pearl and Vine, Second and Vine, Second near the bridge and at the steps on the bridge.

Q. During the rush hours in the evening in the City of Cincinnati, state whether or not a large number of passengers congregate to get on these cars which you have mentioned especially at Fourth and Walnut and Fourth and Vine?

A. At all of the stops there are more or less people to get on.

Q. I will ask you to state what is the habit of the use of the cars in Cincinnati while they are in motion.

Question withdrawn.

Q. State what the habit is as to people getting on the cars in Cincinnati while they are in motion?

A. A good many people get on the cars while they are moving up the hill on Fourth Street and around Fifth Street round Fifth and Walnut.

Q. How do the cars go?

A. Move along slow.

Q. Why?

62 A. On account of the congestion of traffic.

Q. Do the conductors have any occasion between Fourth and Walnut and Fourth and Vine over the route which you have described to change their trolley at any time?

A. No, sir, our line is complete around that corner but there is several cross overs, and in crossing over these intersections these trolleys have to be watched.

Q. And do they or not have occasion to reset the trolleys?

A. Yes sir.

Q. Mr. Green, I will ask you to state whether in your judgment, from your experience and observation of the handling of the street car traffic over the route which you have described, whether it would be possible for your company to get any more cars over that route between the rush hours which you have described in the evening than you now send over that route?

A. Well, now during the rush hours we have our cars drop back a little from the schedule.

Q. Answer the question yes or no and then make your explanation.

A. You want to know whether any more cars could be put through there.

Q. Under the conditions as they exist.

A. No to get through the schedule they couldn't.

Q. I mean in the rush hours.

A. (No answer.)

Q. Let me re-state that question. State whether it would be possible for the company to put any more cars through Cincinnati over the route which — have mentioned in the rush hours, than the Company now does and has been?

63 A. No, sir, we put as many through there now as we can.

Q. Can you give in a general way the headway of the cars between five and six o'clock, and state how many cars you put over that route between five and six o'clock?

A. 81 cars, in that hour.

Q. Round that route?

A. Yes sir.

Q. Mr. Green, I will ask you to state if there is a variation from day to day in the amount of travel on your street cars in the rush hours, and if so state what the causes are that produce that variation.

A. Well, if a little rain comes up about four or five o'clock traffic is very heavy, and on matinee days, or the shows be out a little late or something of that kind.

Q. What about special occasions, what sort of special occasions that would effect the ability to carry the people?

A. Most any kind of a festival; a parade, a holiday or a fire, they all make the travel heavier.

Q. I will ask you to state as a practical street railway man, if it is possible to foretell from day to day the demand that will be made on your company for street car service?

A. No, sir; sometimes we make preparations for a big crowd, and it don't turn out, and on other occasions they overload us.

Q. I will ask you to state whether from your observations as a practical street railway man, whether it would be possible, or
64 whether it would be practicable for the conductors of the street cars to regulate the number of passengers getting on the cars in the City of Cincinnati during the rush hours?

A. No, sir, I don't think it would.

Q. What is the fact with reference to the conduct of people who get on the back platform of cars, is it or not a fact that they frequently conclude afterwards to go inside the car?

A. Yes sir.

Q. Is there any special point on your lines where that is likely to happen?

A. Yes, sir, that is liable to happen in bad weather or cold weather on the bridge; when they get to the bridge, the people standing out on the platform all crowd in the car.

Q. By bridge, what bridge do you mean?

A. The Suspension Bridge is the one I refer to; of course that is also the case when the cars cross over the other bridge going to Newport, but I speak of the Suspension Bridge.

Q. You mean the bridge from Covington over to Cincinnati.

A. Yes sir.

Q. As a practical street railway man, I will ask you to state whether in your judgment it would be at all practicable for the conductors of the street cars to control the conduct of people who are rightfully on the platform and who desire to go inside the car because of the condition of the weather?

A. I think not.

Q. At what point on the company's lines coming from Cincinnati to Covington are the fares collected?
65

A. The conductor begins to collect the fares at Fourth and Vine Street in Cincinnati and collects all the way across the bridge.

Q. How long does it ordinarily take the conductor on an average to collect the fares on a car which is reasonably full during the rush hours?

A. He usually completes his collection by the time he reaches this end of the Suspension Bridge.

Q. Is it not necessary for him to collect them by that time?

A. Yes sir.

Q. Why?

A. Because the passengers begin to get off when they get on this side of the bridge.

Q. You are familiar with the provisions of the ordinance which is involved in this case with reference to the number of passengers to be carried on each car?

A. Yes sir.

Q. Refreshing your recollection—it provides that not more than one-third of the seating capacity shall be allowed to stand inside of the car; I will ask you to state whether in your opinion and from your observation of conditions it would be possible for your company

to operate enough cars through the City of Cincinnati to accommodate the traveling public between Covington and Cincinnati at the rush hours at the rate of passengers as allowed by that ordinance?

A. I don't think we could. I don't think we could possibly do it.

Q. If you were limited to the carriage of the number of passengers per car as provided by that ordinance can you state how
66 many cars would be necessary, say during the rush hours of the morning and evening through the City of Cincinnati to accommodate the traveling public?

A. Almost half as many again as we operate now.

Q. Could you operate that additional number of cars over the route which you have described at the rush hours of the morning and evening?

A. No, sir, we could not.

Q. The ordinance provided for a railing to be put on the front platform to separate the motorman from the people on the platform and to give him plenty of room to operate properly and control the car. I will ask you to state what would be the effect of the railing on the front platform as regarding the use of the platform for the carriage of passengers?

A. It would eliminate the use of the platform the front platform on the present type of cars.

Q. What would be the effect on the front platform as a means of egress or ingress for passengers?

A. We couldn't use it.

Q. Does the company use it as means of getting on and off the cars for their passengers?

A. Yes sir.

Q. What in your opinion from your observations is the effect of the use of the platform upon the loading or unloading of cars and the speed with which you get through the city?

A. The use of the front platform, helps us along and saves lots of time.

Q. Suppose you were to close the front platform for that purpose, what effect would that have upon the time it would require
67 to get through the City of Cincinnati?

A. We would necessarily make slower progress and it would take longer to get around.

Cross-examination.

By Mr. SHEPARD:

Q. Mr. Green, you have testified, or rather referred to the matter of operating the street railway lines of this plaintiff when you first entered their employment some 23 years ago, at that time there was one line of railway operating and that was known as the Madison Avenue line which crossed the bridge into Cincinnati, and the other lines which were operated by the company transferred to that line, isn't that a fact?

A. The Main street line operated through also.

Q. The Main Street line and the Madison Avenue line?

A. Yes sir.

Q. Main street runs north and south at right angles to the river?

A. Yes sir.

Q. And about four squares west of Madison avenue and parallel to it?

A. Yes sir.

Q. Madison Avenue is about two squares west of the entrance to the bridge?

A. Yes sir.

Q. What lines were operated by the company at the time electricity was adopted as a motive power?

A. Madison Avenue and Main Street.

Q. Those two lines converged near the bridge and proceeded across the bridge along the same route that the cars now take?

A. Yes sir.

Q. What was the total length of the lines operated by the Covington company at that time, if you know?

A. I don't know exactly.

Q. Can you approximate it?

A. Well, Main Street was about the same distance it is now, Madison Avenue only extended up to 16th Street.

Q. I want to know in miles if you can give it Mr. Green?

A. Computing the miles from the south end of the bridge, well, Main Street was about two miles, that is a round trip; Madison Avenue was running to 16th Street I suppose that would be about 4 miles up and back to the bridge. One way it would be about two miles, I guess.

Q. What is the total mileage now operated by your company in Kenton County?

A. I have got the books, but I haven't got them here; I can get them to you sometime during my deposition.

Q. How many cars were operated by the company at that time?

A. 16 cars, then on Madison Avenue and 6 on Main Street.

Q. How long did it take to make a round trip in those cars in those days?

A. It took the Madison Avenue one hour and 17 minutes and the Main Street, it took it one hour and three minutes.

Q. What headway would that give the cars?

A. Madison Avenue had 7 and Main Street 9.

Q. That was the total number of cars operated by the company at that time during the busiest hours of the day?

A. Yes sir.

Q. What lines are now operated by the company across the Suspension Bridge?

A. Austinburg, Greenup, Main Street, Rosedale, Holman, Fort Mitchell and Ludlow.

Q. You can't give the mileage of those respective lines?

A. No sir, not until I get my books, but I can give it to you before you leave here.

Q. The Ludlow lines operates, generally speaking operates west on

Third street through the municipality of West Covington and Ludlow?

A. Yes sir.

Q. And is the only means of travel from the City of Ludlow and West Covington to the City of Cincinnati, that is by street railway?

A. Yes sir.

Q. How many cars are there upon the Ludlow line?

A. Five regular cars and five extra cars.

Q. The Fort Mitchell line operates up Madison Avenue and west to the corporation line and thence through the country to the municipality of Fort Mitchell about three miles to the west paralleling the Lexington Pike?

A. Yes sir.

70 Q. How many cars on this line?

A. Four cars during the day and one extra going out of Fort Mitchell and two extras on the Lewisburg division.

Q. You mean both in the morning and in the evening when you say extra cars?

A. Yes sir.

Q. Are you now able to give the mileage of these respective lines?

A. Yes sir.

Q. If you are able to do so, state how you compute the mileage, from the bridge, the end of the bridge or the entire circuit?

A. The entire circuit?

Q. All-right proceed?

A. Fort Mitchell is 12.86 miles; Holman Street is 6.19 miles; Madison Avenue is 5.23 miles; Greenup Street is 5.24 miles; Latonia from the car house is 4.22 miles; Latonia to Cincinnati is 9.30 miles; Rosedale is 10.25 miles; Ludlow is 9.26 miles; Main Street is 3.97 miles; Austinburg is 5.72 miles; Lewisburg from Pike to Hermes is 4.92 miles.

Q. All these lines that you have referred to with the exception of the Latonia line operates through round trip cars over and around this loop that you have referred to in Cincinnati?

A. Yes sir.

Q. And all of these cars on those lines have been put in operation since electricity was adopted as a motive power and since the operation of the Madison Avenue and Main Street lines referred to by you in your testimony?

A. Yes sir.

71 A. Yes sir.

Q. How many cars are operated on the Austinburg line?

A. 3 regulars and 2 extras.

Q. How many on the Greenup Street line?

A. There are — regulars and 5 extras.

Q. How many on the Madison Avenue line?

A. 4 regulars and 2 extras.

Q. On the Rosedale line?

A. 5 regulars and 5 extras.

Q. Holman street line?

A. 4 regulars and 4 extras.

Q. Main street line?

A. 4 regulars and 3 extras.

Q. Fort Mitchell line?

A. 4 regulars and one extra through, and two extras to Lewisburg: there is 4 regulars.

Q. Now then, all of these cars that are operated on all of these lines converge at 3rd and Court Streets in the City of Covington do they now?

A. Yes sir.

Q. Where is 3rd and Court streets with reference to the south portal of the suspension bridge?

A. One short block.

Q. You have referred to the turning back of cars at Third and Court streets to meet unusual demands in Covington such as attractions at the Lagoon or unusual attractions in other places in Kenton County, and it is practicable is it not to turn all of the cars on any of the lines rather than operate them across the bridge?

A. The majority of the travel goes to Cincinnati.

72 Q. So far as practicability is concerned, any one of the cars, or all the cars you have described can be turned back at Third and Court streets?

A. If they were not loaded.

Q. Regardless of the people, so far as the lay of the tracks are concerned and the physical operation of the cars themselves, this would be practicable would it not?

A. We could turn a car around here at the corner of Third and Court Streets.

Q. All the lines conveyed at this point, Third and Court, do they not?

A. Yes sir.

Q. A car from any one line can be diverted to any other line?

A. Yes sir.

Q. Leave out of consideration any passengers on these cars, state whether or not any car from any line could not be taken back over the same line or over any other line in the City of Covington, regardless of whether they are full or empty, now please confine your answer to that question?

A. Carrying the passengers is what the company is after.

Q. Answer the question?

A. Yes, sir, they can.

Q. You have referred to the conditions existing in Cincinnati and particularly the wagon traffic that must be encountered at the north end of the bridge?

A. Yes sir.

Q. The same conditions have existed with reference to this wagon traffic for some years past have they not?

73 Q. And the same delays practically have been experienced all along Walnut street and on Fifth and on Vine Street- as far as any interference such as vehicle or wagon traffic?

A. Yes sir.

Q. Do not these interferences occur during the middle of the day as well as during the rush hours of the day?

A. Yes sir.

Q. With reference to the wagon traffic on Second street, isn't it a fact there is practically no wagon traffic on Second street between 5:15 and 6:15?

A. There is considerable.

Q. Not as compared with the volume there is the middle of the day?

A. No, it is not as heavy as it is there in the middle of the day but there is still considerable traffic there in the evening.

Q. Isn't it a fact that all the freight depots cease to receive freight after 4 o'clock in the afternoon and that there is no wagon traffic to these depots on that account, or from them on account of the delivery of freight?

A. There are a number of transfer wagons that operate jointly with the railroad companies, they operate what we call double headers, that is one wagon behind the other; that occurs along about 6:30 in the evening and as late as seven o'clock, coal wagons running to the elevators; express wagons coming to Covington; there is still considerable traffic there in the evening.

Q. Please bear in mind my question,—my question related to the receipt and delivery at these freight depots isn't it a fact that
74 these depots cease to deliver or receive freight after four o'clock in the afternoon?

A. I don't know that.

Q. Now then, how many cars are operated by the South Covington and Cincinnati Street Railway Company out of the cities of Newport and Covington and through them into the City of Cincinnati all told?

A. Both Covington and Newport.

Q. Yes sir?

A. You want during the rush hours?

Q. (Question is withdrawn and I will put it in a different way.)

Q. How many cars are owned by the South Covington and Cincinnati Street Railway Company which are available for operation?

A. We have 143 cars for winter use and 19 summer cars.

Q. How many of these cars are operated from Covington or through Covington and how many of these cars are operated through Newport?

A. Of course some of these cars are in repair all the time.

Q. Give about the number in repair if you like?

A. We operate about 135 of those cars; some of the cars are continually in repair as I explained before; there are 66 cars operating from Covington that belong to the Covington car house.

Q. Now turn, these 19 summer cars, you put them in commission during the summer in addition to the other cars?

A. About five cars are laid up that have no equipment for
75 the summer.

Q. When you put on the summer cars there are five winter cars that must be taken off?

A. Yes sir.

Q. You have referred to the congestion resulting from the operation of the number of cars that have been in operation since last November or the past year—do I understand you to say that a greater number of cars would not be operated?

A. Yes sir.

Q. When these summer cars are put in use that increase the number of cars, does it not?

A. No, sir, we lay up the box cars.

Q. I understand you lay up five box cars; do I understand you to say that you lay up five box cars and put in commission 19 summer cars?

A. No, sir.

Q. What do you mean?

A. I mean that we don't operate any greater number of cars, or haven't for the last year in the summer than we do in the winter, those box cars are stored away.

Q. Then it is a fact that you operated no greater number of cars in the summer than you do in the winter?

A. Practically so.

Q. You have cars in storage during the summer which you think are not adequate to operate in the summer?

A. Yes sir.

Q. Out of these 136 cars that you say are in operation now, — have been operated every day for some time past?

A. Yes, sir, practically that number.

Q. You operate all that are available and have been been
76 doing so up to that number?

A. Yes sir.

Q. How long have you been operating all that you have?

A. Since possibly June of last year.

Q. 1910?

A. Yes sir.

Q. Prior to that time what number of cars did you own that were not being operated?

A. In the summertime we didn't operate any of the box cars (winter type of cars) until last year when we had to operate some of them to fill up our schedule.

Q. Please give us the number of box cars rather than referring to them by class?

A. I couldn't say how many.

Q. You say that it is impossible for you to anticipate from day to day the variations in travel on your cars you mean in the rush hours?

A. Yes, sir; we could run more cars during the middle of the day.

Q. What about it with reference to the rush hours?

A. No, sir, we couldn't do it, we have got on all the cars that we can put through during the rush hours.

Q. In answering a question on direct examination you qualified your opinion with reference to the practicability of operating cars by stating that you could not operate them on schedule, please state

to what extent the cars would be delayed by operating the number of cars you estimate would be required to comply with this ordinance?

77 A. I couldn't exactly estimate it, but the delay would be as much time as it would require to get that many cars around the fountain; as it is now we have a line of cars waiting to get around the square from five to six in the evening from 5:15 to 6:10 the cars are waiting there continuously to get around.

Q. A great many passengers that apply to your company for transportation board the cars on Walnut street do they not?

A. Yes sir.

Q. Isn't it a fact that the majority of the cars have a load before they reach Fifth and Walnut?

A. Some of them are comfortably well filled.

Q. Isn't it a fact that as a rule all the seats are taken and enough persons standing in the car to bring the total number of passengers up to that provided for by the ordinance?

A. Yes sir, I think that is about right, the cars are pretty well filled.

Q. Isn't it a fact that after this number have boarded the car that each additional passenger requires a great deal more time proportionately to secure passage on the car than those who get on earlier did?

A. (No answer.)

Q. Isn't the loading of the car much slower after they pass Fifth and Walnut than it is before they get there?

A. As a usual thing we aim to keep the back platform clear; we don't delay our cars any in picking up passengers.

Q. What is the average load on these cars during the rush hours, say between 5:15 and 6:15?

A. Along between 65 and 70.

78 Q. Isn't it a fact Mr. Green, that after the first 50 or 60 people enter the car that much more time is required for the other 10 or 15 than for the other 50 or 60 who preceded them?

A. No, sir, I don't think that is a fact.

Q. Isn't it a fact that you don't permit women and children to remain on the platform?

A. Very few women and children board the car after it is that crowded; they usually get on before that many people get on the car; men and young women board the car without any delay.

Q. Ladies and children that board the car at Fifth and Vine or on Vine street must make their way through the crowd on the platform and secure places inside the car?

A. Yes, sir.

Q. Isn't it a fact that they require a great deal more time than people who board the car before it is crowded?

A. There are very few ladies or children who try to board the car there—I never knew of a case where the car was delayed by picking up passengers. The delay that occurs to us is by wagons and the cars that interfere with us at the intersections.

Q. Mr. Green please answer the question I have asked you with reference to whether the crowding of people into a car already

filled don't delay the car more in proportion than the loading of the same number of persons before the car becomes crowded?

A. We don't crowd the people in the car; they crowd themselves in the car, and as soon as they are on the car we start up.

79 Q. Are they now slower in getting on the car when it is loaded.

A. Yes, sir.

Q. To what extent is the delay of the car due to the delay in loading after they become filled up?

A. We don't attempt to delay a car to pick up passengers after the car is loaded. Our aim is to get the car around the fountain as quickly as possible.

Q. Mr. Green, do you stop every time there are people at any intersection seeking to board the car?

A. Yes, sir. Whether there is any one standing there or not we stop.

Q. In Cincinnati?

A. Yes, sir.

Q. Crossing over where people are, you stop to take them on?

A. Yes, sir.

Q. Regardless of how loaded the car is?

A. No, sir, if the car has all the people the car can handle at the rush hour in the evening we go right on.

Q. So when the car is filled to that extent you go right on without taking on any more passengers?

A. Yes, sir.

Q. What you mean* to say is, either the crew of the car or the Inspector who sees the car, exercises some judgment as to when they shall proceed without taking on additional passengers?

A. Yes, sir.

Q. You referred in your direct examination to the putting back of the cars, explain what you mean by that?

80 A. Losing time on the running of the schedule like it requires 15 minutes from here over during the day they drop back 5 or 10 minutes some of them in getting back to this point; at this point, I mean Third and Court Streets in Covington.

Q. Isn't it a fact Mr. Green, that cars which would ordinarily be due to leave the Fountain shortly before the evening rush hours are dropped back so as to be brought within the rush hours?

A. No, sir, there is no change in their schedule in that regards; the extra cars are so aided as to fill in the rush hours.

Q. There is absolutely no dropping back of the regular cars which would have left Fountain Square before the rush hours so as to bring them within the rush hours and take care of a portion of the crowd?

A. No, sir, the extras are added to that time to take care of the rush.

Q. Referring to the railing upon the front platform on the cars, isn't it a fact that there is now a railing on the larger cars operated by the company?

A. On one side of the controller there is, but that railing was put

there before the ordinance was ever thought of it is put there for the protection of the motorman.

Q. Please refer to the ordinance in question and see what provisions in the ordinance would require such a construction of a railing as would prevent persons getting in the car and out of the car?

A. Section three.

Q. In your opinion it would be necessary to comply with section three to so construct a railing as to prohibit the use of the car in getting out and into the car?

81 A. Some type of cars it would.

Q. What proportion of your cars?

A. Outside of thirty cars, I think it would make a difference; there are possibly thirty cars that it would make no difference in.

Q. How many of the old type of box cars are you operating?

A. 43.

Q. You mean both in Newport and Covington?

A. Yes, sir.

Q. How many in Covington?

A. About 27.

Q. Would it not be possible to construct a railing which would comply with the provisions in this ordinance on all the cars with the exception of these old box cars and leave the platform open as a means of getting into the car and out of the car?

A. No, and I don't believe that the railing that we have on there now fulfills the ordinance, because it don't keep the motorman from the passengers; it only protects one side of the controller; that railing was put on before the ordinance was thought of in this part of the country, I guess. If we had put that behind the motorman, so as to comply with the ordinance, I don't think any one could get inside of the door; we have had the thing on and measured it. Mr. Horton will enlighten you as to the measurements.

Q. Are the cars at present operated by the company so designed as to provide for the taking on and letting off of passengers by means of the front platform?

A. They were designed and used for that purpose.

82 Q. Isn't it a fact that they have vestibules upon them which are very difficult to open, and they have to be opened from the inside by the motorman?

A. Yes, sir.

Q. The doors are independent doors which must be opened to permit one to get in the car from the platform?

A. Yes, sir.

Q. Weren't these vestibules, the doors of the vestibules designed to prevent access to the car and the leaving of the car by means of the front platform?

A. No, sir, they were designed to fulfill a law passed in Ohio; they forced us to do that; and they were designed also to permit passengers to get off the car and on the car by means of the front platform.

Q. Is that style used in the vestibule, and then fastening and unfastening suited best for the use of the platform for loading and unloading passengers?

A. If the car had been originally planned to have a vestibule it would have a larger platform. We designed the door for our equipment and still continue to use the platform and it is about the best device that we could get for so doing.

Q. The door was designed to constitute a vestibule and not to afford any means of getting in and out of the cars?

A. Yes, sir.

Q. It is not the best designed door or platform for loading or unloading purposes?

A. It is practically the same as used on the very new equipment; of course the entrance is not as large and the motorman is not supposed to open the door until the car comes to a stand still.

83 Q. The only difference then is, the pay as you enter has a larger platform?

A. Yes, and they open their door with a lever and we open ours with a rod.

Q. There are 66 cars operated by your company across the Suspension Bridge?

A. Yes, sir.

Q. What is the number of cars operated by the Newport division into Cincinnati which use the track on Walnut Street between Fourth and Fifth Streets jointly with the Covington cars.

A. 65, I think.

Q. What if any cars are operated by the Covington Company across the Suspension Bridge that are used for delivering passengers into the City of Newport?

A. The Newport and Covington line; belt line we call it; we run two extra cars down this way in the evening.

Q. Down which way?

A. Down through Covington.

Q. What cars are they?

A. Those are Dayton cars.

Q. You have referred to the wagon traffic on Walnut street and on Fifth street and also on Vine street isn't it a fact Mr. Green that on each of these streets there is room for the wagons and the space for the wagons outside of the space occupied by the tracks of the Company?

A. That space on the sides is usually taken up by some wagons or vehicles standing, and the other wagons and people and automobiles and traffic of that kind would get on the tracks.

84 Q. They travel in the car tracks until they pass these wagons and vehicles on the side?

A. Yes, sir.

Q. There is only one line of track in Walnut Street in Cincinnati is there not?

A. From Second to Fourth there is only one track, from Fourth to Fifth it is a double track.

Q. On the north side of Fifth there is but one track?

A. Yes, sir.

Q. One wagon way?

A. Yes, sir.

Q. The wagon traffic on that side of Fifth is all the same direction as that taken by the cars?

A. I saw something in the papers where they were going to regulate that, but it is not in effect yet.

Q. Leaving Fourth street coming south toward the bridge there is just one line of track on Vine to Second?

A. Yes, sir, leaving Fourth street.

Q. You have referred to the number of cars that are allotted to the Covington barn, by whom is this allotment made?

A. Myself.

Q. Made by you as you determine the traffic demands?

A. Yes, sir.

Q. What is the average load on the Newport cars during the rush hours?

A. About the same as on the Covington cars.

Q. And this condition has existed how long, that is having a rush hour when the average load is 65 to 70 passengers?

85 A. Traffic has continued to increase ever since I was Inspector and we have continued to increase the number of cars until we have reached the point where we can't get around the fountain with any more than we are now using.

Q. Isn't it a fact that you haven't any more cars?

A. The fact is that we can't get any more around the fountain during the rush hour.

Q. That is the sole reason you don't operate more cars?

A. Yes, sir.

Q. You say the street cars operate around this loop during the rush hour?

A. Yes, sir.

Q. And the total number of cars operated is 66?

A. Yes, sir.

Q. Is it a fact that some of these cars make more than one trip during the hour?

A. Yes, sir.

Redirect examination.

By Mr. CASSATT:

Q. You have just stated that the sole reason for the condition at the rush hour is due to the fact that you can't get any more cars around your route in Cincinnati than you are doing now?

A. Yes, sir.

Q. I will ask you to state if you could get any more cars around there, have you got the cars?

86 A. We are using our entire equipment at the present time.

Q. Is that true since June of last year?

A. Yes, sir.

Q. I will ask you to state please how many new trips or how many additional cars between Covington and Cincinnati that run over the streets of Covington were put on during the rush hours at any time within the last year?

A. 13 trips.

Q. Between what hours?

A. Five and six o'clock in the evening.

Q. They weren't just local between Covington and Cincinnati.

A. No, sir.

Q. You have referred to the pay as you enter cars I will ask you to state whether or not you mean by that any cars belonging to this company?

A. No, sir, I spoke of them only in reference to the style or type we use.

Q. Is the pay as you enter car a new and modern car?

A. Yes, sir.

Q. A very long car?

A. Yes, sir.

Q. Is it a double track car?

A. Yes, sir.

Q. Those are in use in the city of Cincinnati on some of the street railway lines over there?

A. Yes, sir.

Q. Isn't it a fact that irrespective of there being any obstruction in the way, that some wagons go up the Walnut Street hill in the street car tracks any way?

A. Yes, sir.

87 Q. That many start at the bottom of the hill and use the street car track all the way up the hill?

A. Yes, sir.

Q. Why?

A. It is easier pulling, easier on their horses.

Q. Do I understand that you use about 66 cars between Covington and Cincinnati?

A. Yes, sir, regular.

Q. And about 65 between Newport and Cincinnati?

A. Yes, sir, and some of these cars make more than one trip during the rush hour.

Q. Take during the rush hour, do you have as many trips between Covington and Cincinnati as you do between Newport and Cincinnati?

A. Not much difference. The amount of travel is practically the same.

Recross-examination.

By Mr. SHEPARD:

Q. How many additional cars would be required in your opinion to comply with this ordinance?

A. We would have to operate about half as many again as we do now; while the same number of people would use the cars apparently.

88 Redirect examination.

By Mr. CASSATT:

Q. In order to do that you would have to supply not only that

number of cars, but obtain a way to get them through Cincinnati?
A. Yes sir.

THOMAS GREEN.

STATE OF KENTUCKY,
Kenton County:

I, Arnold Hermes, a Notary Public in and for the County and State aforesaid, do certify that the above and foregoing deposition of Thomas Green was taken before me at the office of the South Covington and Cincinnati Street Railway Company, Covington, Ky., on the 26th day of April 1911; that said witness was first duly sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his deposition that the testimony of said witness was taken down in shorthand, by a stenographer other than the Notary and transcribed by such stenographer other than the Notary, upon agreement between the parties hereto, by their respective attorneys.

I further certify that at the taking of the deposition the plaintiff was represented by Hon. Alfred Cassatt, Attorney for the South Covington and Cincinnati, Street Railway Company and that the defendant was represented by its attorney, Hon. John E. Shepard, City Solicitor.

My commission expires on the 15th day of February 1912.

[SEAL.]

A. A. HERMES,

Notary Public for Kenton County, Kentucky.

89 Kenton Circuit Court, Common Law & Equity Division.

12434.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY
COMPANY, Plaintiff,

vs.

CITY OF COVINGTON et al., Defendants.

Deposition for Plaintiff.

The deposition of James C. Ernst, taken by agreement on Friday, the 9th day of June, 1911, at the office of the plaintiff, Third Street and Court Avenue, in the City of Covington, Ky., to be read as evidence on behalf of the plaintiff in the above styled cause.

It was stipulated between counsel that the deposition may be taken in shorthand and transcribed by the stenographer and the transcript may be used as evidence in the above styled cause, subject to exception by either party for relevancy or competency. The signature of the witness to the deposition is waived.

Present on behalf of the plaintiff, A. C. Cassatt, Esq.

Present on behalf of the defendant, John E. Shepard, Esq., City Solicitor.

90 The witness, JAMES C. ERNST, of lawful age, being first duly sworn, deposes as follows:—

Direct examination.

Mr. CASSATT:

Q. —. State your name.

A. James C. Ernst.

Q. 2. What official position do you occupy with the plaintiff company?

A. President.

Q. 3. How long have you been president of the company?

A. Since January 1, 1897.

Q. 4. What part do you have in the management of the company?

A. Duties accruing to the president—I have the general management of the affairs of the company.

Q. 5. What lines does the plaintiff company operate through the City of Covington?

A. You mean all the different lines?

Q. 6. Yes.

A. Madison Avenue and Greenup, Austinburg, Ludlow Main, Rosedale, Holman, Lewisburg and Fort Mitchell,—I don't know whether you call that one or two, and Latonia line.

Q. 7. Which of these lines are operated through the City of Cincinnati?

A. All of them.

Q. 8. With the exception of the City of Cincinnati, which of the lines you have mentioned, operate outside of the City of Covington?

A. Ludlow and Fort Mitchell, those are the only two lines.

91 Q. 9. What, if any Covington business is done by the Ludlow and Fort Mitchell lines, speaking in general terms?

A. The Fort Mitchell does about between sixty and seventy per cent of its business; the Ludlow line I should judge now, about forty per cent. I haven't taken those records; I presume about forty per cent.

Q. 10. The percentage to which you referred, are the percentage on those lines that represent Covington business?

A. Yes sir.

Q. 11. Does the total business done by the Ludlow and Fort Mitchell lines bear a large or small proportion to the total business done by all the lines you have named?

A. You mean the total business of those two lines to the total business?

Q. 12. Yes.

A. Small proportion.

Q. 13. Can you state about what percentage of the business done by the lines of your company in Covington, is interstate business, that is to say, business between Covington and Cincinnati?

A. You mean the total business between the two towns, as compared to the whole business we do?

Q. 14. Yes.

A. Seventy-five to eighty per cent.

Q. 15. Are there any regular cars on any of the lines you have mentioned, which do not operate over your route in the City of Cincinnati?

A. No sir.

Q. 16. How many bridges are there across the Ohio River between the City of Covington and the City of Cincinnati upon which the street cars may operate?

92 A. One.

Q. 17. What is the name of that bridge?

A. Covington and Cincinnati, Suspension Bridge Co.

Q. 18. Is it known roughly as the Suspension Bridge?

A. Yes sir.

Q. 19. Over what streets does your company operate in the City of Cincinnati?

A. You refer to Covington lines, I suppose, in all these questions?

Q. 20. Yes.

A. Second Street, Walnut, Vine and Fifth.

Q. 21. Have you franchise rights upon those streets?

A. Yes sir.

Q. 22. Has your company franchise rights upon any other streets, or any other route in the City of Cincinnati?

A. Not for the operation of Covington cars.

Q. 23. Have you franchise rights over any other streets in the City of Cincinnati upon which you could operate your Covington cars?

A. No sir.

Q. 24. Have you read the deposition of Mr. Green heretofore given in this case?

A. Yes sir.

Q. 25. In which he describes your routes in Cincinnati and congestion over the Cincinnati route?

A. Yes sir.

Q. 26. I will ask you whether you have ever made any effort on behalf of your company, to obtain a changed route or different arrangement in Cincinnati, which would relieve that congestion?

93 A. Yes sir.

Q. 27. State what that effort was and what was the result?

A. The conferences were held with the Cincinnati Traction Company and with the members of the Board.—I don't know whether you call it the Board of Public Works or Public Affairs, or whatever it was—The Board of Public Service looking toward relieving congestion around Fountain Square and we took the position and formulated a plan and map, showing what we would be willing to do if we got their consent and at the same time the Council would give us a franchise covering the points named. This plat showed a complete revision of lines, which would relieve congestion at Fourth & Vine, Fifth and Vine, Fifth and Walnut, Fourth and Walnut, Fourth and Main and Fifth & Main. Those are the points at which congestion occurs. The result of that change would have eliminated from Fountain Square all of the Covington cars, placing them around

Fourth street, and eliminating the Cincinnati Traction Co.'s line from Fourth street, so there would be a less number of cars—considerably less number of cars at each of the points named, where the congestion occurs. The Cincinnati Traction Company refused to consent to this arrangement and the Board of Public service acknowledged that unless they would consent, of course we could not get any franchise. The result was that these negotiations fell through. That same plan has been attempted twice by us in the last six or eight years.

Q. 28. Has any other plan ever been suggested or have you ever been able to devise any other plan to which you could get the consent of the Cincinnati Traction Company and the City of Cincinnati, which would reduce the congestion on the lines used by your Covington cars?

A. None except they made a suggestion which would relieve the congestion by putting us down in the bottom. Of course we objected to that.

Q. 29. By "they" you mean who?

A. The Cincinnati Traction Company.

Q. 30. You have spoken of the official Board of Public Service; by that you mean the Board of Public Service of the City of Cincinnati?

A. Yes sir, represented by Mr. Harry Manse. I don't know what they called it at that time, but he was a member of the Board.

Q. 31. You have referred to the position taken by the Board of Public Service as being that because the Cincinnati Traction Company would not consent they could not make the change; do I understand you to mean that that objection was because in order to carry the plan through it would be necessary for the Cincinnati Traction Company to give us some of its franchise rights?

A. It would have compelled the Cincinnati Traction Co. to have changed the route of some of their lines from the way they run at present to other streets, so as to give us up a portion of the route which they now occupy with their cars. I think under the franchise over there they have the privilege without endangering their franchise right. Council has the right of allowing them to change their route.

Q. 32. Can Council compel them to change their route?

A. I don't think they can.

A. 33. What length of time is required to get from ten to twenty new street cars of the sort which your company requires.

95 A. It would average four months, depending upon the busy season of the companies who are making cars.

Q. 34. In the month of November 1910, under the conditions as they then existed, how long would it have taken you to obtain from ten to twenty new street cars?

A. The factories told us it would take about four months from the time they received the order.

Q. 35. How long a time in addition, would it have taken to prepare plans and specifications?

A. About two weeks.

Q. 36. How long would it have taken for you to put the street cars

up ready for use after you received them from the company which had made them?

A. You mean the entire amount, or each car?

Q. 37. The entire number.

A. Take, if everything worked right, about two weeks.

Q. 38. You are familiar with the ordinance which is involved in this case?

A. Yes sir.

Q. 39. How long would it have taken you after the passage of that ordinance in October, 1910, to provide your cars with the railings called for by that ordinance, including the time necessary in planning the railings, determining what kind should be used, the manufacture of them, and placing them upon the cars?

A. About a month, I should judge, if we had good luck. That is a very difficult question to answer satisfactorily. The company was required to make two or three plans or rather, two or three different kinds of railing, to see what effect it would have on the

96 four different kinds of cars we are using. Placing them on after they were decided would take less time than it would to make up our mind what would go on.

Q. 40. Would it have been practicable for you to make the necessary experiments and planning and manufacturing of the railings and getting them on the cars within that period of a month?

A. I don't think it was possible to accomplish it inside of a month.

Q. 41. What part of the work was it you had in mind when you said it would have been done inside of a month?

A. To have equipped one car—style of the car, after deciding on what was necessary or practicable, we could have shot them all on in quick order, but we had to devise different plans for almost each of the four different kinds of cars. Then the time would be required in getting those cars into the shops, because we can't take them all in at one time. It is necessary to take them off the road so as not to have too many cars in the shop at one time. I think the month would have been the quickest time in which we could have equipped all the lines.

Q. 42. What would be the effect of railings in accordance with the ordinance, upon the front platforms of your cars?

A. It would eliminate almost entirely the carrying of any passengers on the front platform by opening of the door on the vestibule side.

Q. 43. What effect would it have had upon the entrance and exit of passengers through the front door of the car?

A. You mean if they were going into the car or going out of the car on the street.

97 Q. 44. I mean getting into or out of the car by the front way?

A. You mean from the street.

Q. 45. Getting into the car from the street or getting out of the car onto the street—I refer to the loading and unloading of passengers by way of the front platform?

A. Almost stop the ingress or egress of passengers by the front platform.

Q. 46. What would have been the effect of that upon the time taken by your cars in getting through the City of Cincinnati,—would it have lengthened or shortened it?

A. It would have delayed the cars considerable owing to the fact that it would require all the passengers to enter and leave by the rear platform.

Q. 47. Mr. Ernst, assume that your facilities in Cincinnati were such that you would run as many cars as you wanted to during the rush hours; please state whether it would have been practicable to employ men for the purpose of running the additional number of cars in the rush hours, which would have been made necessary by this ordinance?

A. Very difficult matter for us now to get men to run extra cars for the short time in which those cars would be employed simply for the rush hours, morning and evening. We have got enough cars now on the lines to handle all the people in my judgment, if those cars would run without being blocked.

Q. 48. Where?

A. In the City of Cincinnati. Not according to the ordinance.

Q. 49. Why not?

A. Simply because the few people allowed on the cars in proportion to the number we carry, would require too many cars to carry the same number of people we carry now.

Q. 50. By too many do you mean more cars than you have?

A. More cars than the company has. You couldn't put through Cincinnati today enough cars, in my judgment if we had a clear track, to carry the people, simply as required by that ordinance, within the time of the rush hours, when those people want to go home.

W. 51. What would you say as to the practicability of providing extra cars to run from the bridge in Covington—from the end of the Suspension Bridge in Covington, or near there, out over the various Covington lines, as a means of reducing the congestion that prevails at the rush hours in the evening?

A. It would not affect travel from Cincinnati at all.

Q. 52. Why not?

A. Because people get on over there, they don't get on over here.

Q. 53. Wouldn't they transfer—wouldn't they be willing to transfer when they got to Covington if they found street cars there?

A. Under no circumstances would anybody get off and get in another car. You wouldn't be able to tell what people to get off and what people to stay on.

Q. 54. Would it be practicable for the men in charge of the car to compel any specific people on the car to get off and transfer to street cars in Covington?

A. No sir.

Q. 55. Have you ever made any experiments in that line?

A. We ran from Third and Court Avenue, at the request of a lot of people in Latonia and Rosedale, extra cars to Rosedale every evening, leaving Park Place and Court Ave-

nue just ahead of the rush cars, that is, overcrowded cars, in the evening. Just as soon as that car from Cincinnati which has a heavy load, came to Third & Court, we would start the extra car up Madison Avenue, going clear through to Rosedale. After eighteen months or two years' travel, those cars absolutely failed to carry the people—what it was I don't know but they would go to the barn frequently with vacant seats. The result is we took those cars off, and people in Rosedale acknowledged themselves that they did not pay. Why I don't know. The same thing occurred in Newport, on the Washington Avenue line. To relieve that congestion we ran extra cars from Cincinnati to Tenth & Washington for three years, and the people on Washington Avenue and adjacent streets absolutely refused to patronize those cars, so as found upon investigation that the Fort Thomas cars were carrying a little over 66⅓ per cent of their load of Newport travel and we made an average of seven stops out of nine or ten,—we made seven stops of every car on the Fort Thomas line every night for Washington Avenue people and adjacent streets, when there was a Washington Avenue car a minute ahead.

Q. 56. The Fort Thomas line to which you refer, is a line going over the same route as the street cars you have described, but going further?

A. Yes, sir, going further. It was the same condition that existed on the Rosedale and Madison Avenue and we gave them up and discontinued them.

Q. 57. Is there much travel between the central part of Covington,—I mean the business part of Covington, and part near the bridge, to the outlying districts,—is there much local travel in Covington, from the court house and post office and Suspension Bridge, out to other portions of the City of Covington?

A. Yes, sir, there is some local travel.

Q. 58. When you had the special cars running from Park Place, to which you have referred, would the local travel along the line taken by those cars, avail themselves of those cars or would they take whatever car came first?

A. Take the first car that came. That's human nature the world over.

Q. 59. Have you in your experience as a street railroad man, had occasion to observe the problem of over-crowded cars at rush hours in other cities?

A. Yes, sir, the same condition exists in almost every city I know of in the United States.

Q. 60. Do you know of any City where the street railway found it practicable to furnish accommodations, or has been furnishing accommodations to the traveling public at the rush hours of the day, in accordance or anywhere near in accordance with the terms of this ordinance involved in this case?

A. I do not.

Q. 61. I will ask you to state whether or not it is any advantage to the company to have overcrowded cars?

A. It is a very great disadvantage to us.

W. 62. Why?

A. We find upon investigation that the company loses quite a number of fares, due to the failure of the conductor to be able to collect money from each passenger.

101 Q. 63. What is the character of the population of Covington with respect to their places of doing business?

A. Our business principally of taking people from Covington to Cincinnati, and bringing them back.

Q. 64. Where do people who live in Covington, generally speaking, have their places of business?

A. Where do they work?

Q. 65. Yes.

A. In Cincinnati.

Q. 66. While you have been in the street railroad business, has your attention been given to the details of the operation of cars, and the relations between passengers and employes, and the question of the control of the employes over passengers &c.?

A. Yes sir.

Q. 67. I will ask you to state whether it would be practicable for your conductors or your employes in charge of cars, to control, according to the terms of this ordinance the number of people riding inside of the cars, so as to be at all times in conformity with the provisions?

A. Absolutely impracticable, in my judgment.

Q. 68. —.

— He would have to use force to detain those people that wanted to get in the cars if there was room enough to accommodate them, or else we have to close the car up entirely, and let it go by without giving them a chance to get on.

Q. 69. Would the last expedient to which you have referred, answer the provision, in view of the fact that the number of people on the back platform is not controlled by the ordinance?

102 A. We wouldn't close up the back platform; we simply have to close the entrance to the door that goes into the car.

Q. 70. Would that be practicable, in view of the fact that people are constantly going in and coming out?

A. I don't think it would.

Q. 71. From your knowledge of the population which patronize your cars, and the condition of the public sentiment, would it be practicable for your conductors to compel a passenger to either go in or stay out of the body of the car under any circumstances?

A. He might attempt to by using force; whether he would be successful or the passenger would be successful would be a question.

Q. 72. Would it be possible to do this without the use of force?

A. I don't think it would.

Q. 73. What would be the result, so far as order upon the car is concerned, of the attempt to use force?

A. I think the conductor would get the worst of it.

Q. 74. I will ask you to state whether it would be practicable for your conductors to keep watch or control of the number of passen-

gers in a car, and at the same time attend to the collection of fares?

A. The only way that could be done, as I have stated before, that was when the car received its quota, according to that ordinance, inside the car he would have to lock the door,—lock the egress and entrance of the car.

103 Q. 75. Suppose that some passengers left the inside of the car, wouldn't it be necessary for the conductor then to go to the rear of the car?

A. And lock it again, and wait until he come to the next passenger and go back and collect his fare, which he never would be able to do from the time he left Cincinnati until he got to Covington.

Q. 76. Mr. Ernst, what about the heaters on your cars what kind of heaters do you have, and how do they compare with other heaters that have been devised or are obtainable for use in street cars?

A. We have the most improved pattern of electric heaters.

Q. 77. Are there any better heaters than the electric heaters?

A. None that I know of.

Q. 78. I will ask you to state whether it is practicable in the operation of a street car over your line, to maintain at all times in such cars, a temperature of 50 degrees, or more?

A. No sir.

Q. 79. Why not?

A. Well, we can't control either the ventilators or opening of the doors.

Q. 80. Who interferes with the control by the employes of the car, of the ventilators and doors?

A. Passengers open and close ventilators whenever they feel like it. A man standing up wants them closed, and a man sitting down wants them open. Doors opening both front and rear make the car one heat or another, according to how those doors are opened.

104 Q. 81. How is the temperature of the car affected by the variation in the number of people inside the car?

A. Very considerably.

Q. 82. What special conditions, if you know, arise in the operation of these cars, which affect the ability to comply with this ordinance, as to the number of people or as to the number of cars you can furnish at any given point,—what special conditions are there which might affect the ability of your company to comply with this ordinance in the matter of affording accommodation to the traveling public?

A. Break-down, or parade, or fire, simply disarranges the entire service until the time taken up with those obstructions is removed.

Q. 83. Do you know of any city in which there has ever been an effort made—a practicable experiment made, in the limitation of the number of passengers to be carried on each car?

A. Albany, New York, is the most striking example I know of.

Q. 84. What was the result of that experiment?

A. After the public commission had required the lines to give a

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY
COMPANY V. COVINGTON.

The missing page 106 of the transcript, to be inserted between pages 58 and 59 of the printed record and treated as part of that record by stipulation filed in the case.

"on to beat the band. When there is a little delay in our cars, some places five minutes, the cars that come in the first five minutes are jammed to suffocation, and cars following along have their half-load. That occurred the other night at the Suspension Bridge, where one of the Cincinnati Transfer Co. wagons broke down at the intersection of the bridge and held both lines there for twenty minutes; our cars were lined on Second and up Vine, and for the first ten minutes after those cars were loaded beyond their capacity, and after that had from half to three-quarters of a load. Those people must have known, as you would have known, that there were other cars coming, but they won't wait, they want the first car that comes that will take them to their destination.

"Q. 86. I will ask you whether or not your cars will carry without danger to persons or health or to comfort, a greater number of passengers than are permitted by this ordinance to be carried inside the cars?

A. Yes, sir.

Q. 87. Would you be able to state approximately how much greater carrying capacity is than that prescribed by the ordinance, consistently with comfort and health?

A. I should judge, without railing on the front, without provision for the inside, and without the railing on the rear, I should judge we could carry twenty more people per car. The ordinance provides that the company shall not carry on the inside of the car more than one-third of the seated load.

Q. 88. I will ask you to state whether that inside of the car would accommodate without danger to the health or comfort of the passengers, more than that prescribed number inside the cars?"



trial, the citizens of Albany, through their different associations, at a hearing of that commission, gave such testimony against it, that the order was rescinded. It was shown to be utterly impracticable in every respect.

Q. 85. Do you recall any of the practical difficulties which were met in that experiment?

A. The cars were required to carry a certain number over and above, or allowed to carry a certain number over and above the seating capacity. After they were supposed to have the required number they were not to stop, and the testimony before the commission developed the fact by citizens who gave personal experiences that they were sometimes compelled to wait at different corners all the way from twenty minutes to an hour and a half longest time, before they were allowed to board a car. Women gave testimony if I remember correctly, that it caused them not only considerable delay but made some of them sick during the rain, because the cars were not stopped. And the commission decided from their own observation in other towns, that the rule was absolutely impracticable and could not be enforced during the rush hours where the people all wanted to go home at the same time. One of the instances was in Troy, New York, where the collar factories are out at half past 5 o'clock, and five thousand employes that all want to get home at the same time, and the question came, How could they bring them home? On this ordinance it would absolutely prevent a compliance with the ordinance. We have almost the same conditions in Cincinnati, the number of people that are let out from the First National Bank, Union Trust Building, Mercantile Library, Traction Building, the Ingalls Building, and the Fourth National Bank Building, we have estimated it somewhere between three and four thousand people every night, maybe larger. Those people are all out of work from 5 to half past 5, in addition to the people coming from other sections, they all go to Fourth Street or Fountain Square to get home at one time. I don't believe it is practicable for us to give enough cars to carry people under this ordinance of limiting the number of passengers to a car, from the fact that the people will not wait for one car from another, but take the first car that comes, and hang—

106 Page 106 not in the transcript.

107 A. Yes, sir.

Q. 89. Can you estimate about how many more inside the car?

A. We could carry from twelve to fifteen people.

Q. 90. More?

A. Yes, sir, more on the inside than that capacity calls for.

Cross-examination.

Mr. SHEPARD:

Q. 1. Mr. Ernst, you are president of the South Covington & Cincinnati Street Railway Company, this plaintiff company?

A. Yes, sir.

Q. 2. Does this company in fact operate any cars at all in Cincinnati?

A. The C., N. & C. operates lines in Cincinnati.

Q. 2. That is not the plaintiff company?

A. No.

Q. 4. This plaintiff company then, only undertakes the operation of the cars on the Kentucky side of the Ohio River?

A. That's all we have any right to.

Q. 5. Referring to your testimony concerning the regulation of the number of persons upon the back, it is a fact isn't it, that the motormen and conductors now exercise discretion about the number of people permitted upon the car and when in their judgment cars are full, do go by without stopping?

A. The orders are not to go by anybody that wants to get on the car.

Q. 6. But referring to the operation and practical working
108 out,—that is, the practical working of these cars there are every day instances where the motorman and conductor conclude that the cars are full and cannot accommodate any more passengers, and refuse to stop or accept any more passengers?

A. I don't know that they do that unless the car is so absolutely jammed that it is self-evident that nobody can get on, but the rule is not to pass anybody without stopping.

Q. 7. But they exercise that discretion as to whether or not the car is full and will not accommodate any more?

A. I don't think they do, they are not allowed to but they may do it.

Q. 8. If they go by they would do it?

A. If they go by; seldom I ever saw a car go by without stopping.

Q. 9. Referring to the control of the passengers after they are upon the car, with reference to their position in the car or outside of the car, isn't it a fact that the crews of the cars exercise control over passengers now, as to their position in the car, that is, those that are smoking are permitted to occupy one part of the car only, and other regulations are in force as against the passengers and occupants of the car?

A. The conductor endeavors to exercise his judgment as to getting passengers to move forward in the car, if he thinks it can be done, to allow more passengers to get on the smokers are only allowed in the rear and in the last three seats, but if there is any man smoking at any other part of the car, he don't force that passenger to take
109 another position if he don't smoke, he simply stops him smoking at that point, but don't direct him to go any place else.

Q. 10. The same is true with reference to spitting upon the floor, and bad language, that is prohibited and those regulations are enforced by the crews of the cars?

A. We caution the men not to do it.

Q. 11. They are enforced?

A. They try to enforce them. I wish you would give me some rule to stop spitting on the floor.

Q. 12. You have given it as your judgment that approximately twenty more person could be placed upon these cars than is permitted by the terms of this ordinance; please state how this load would be apportioned,—please state first how the number of passengers permitted by this ordinance would be apportioned to the car?

A. We figure about twelve on the inside, depends on the different cars we have.

Q. 13. Twelve standing you mean?

A. Yes, sir, some times runs fifteen on the inside and we figure at least four more on the front platform, and four more on the back.

Q. 14. You mean twelve more standing than this ordinance permits to be standing on the inside?

A. Yes, sir.

Q. 15. What do you estimate this ordinance to permit to stand on the inside?

A. One third more than the seating capacity of the different cars.

Q. 16. What is that approximately?

A. On the big cars they all seat thirty-two people.

Q. 17. You estimate that there could be thirty-two seated and about twenty-two standing?

A. I estimate one third more than that, it would be eleven passengers on the inside.

Q. 18. And twelve additional, you say?

A. Yes, sir.

Q. 19. That would make twenty-three?

A. Yes, sir.

Q. 20. Twenty-three standing?

A. Yes, sir.

Q. 21. Do you know the dimensions of the space which is available for those twenty-three passengers standing?

A. We put that on those plats by actual measurement of each car, showing the square feet of surface to each passenger. I didn't want to go into the detail of each one of our cars, I think that is shown by the plat, showing the space occupied by each one of those people.

Q. 22. Where is the greater percentage of the load taken upon these cars that are operated through Cincinnati?

A. They begin to load at Fourth & Walnut, and continue picking up their load up to Fifth & Vine. I should judge seventy per cent, or their load, if not greater,—frequently eighty per cent in rush hours, is on the cars at Fifth & Vine.

Q. 23. So that between the time the car leaves Fourth & Walnut, going north, until it arrives at Fifth & Vine, turning South, it has taken on seventy-five per cent of the load?

A. Yes, sir, taking each car.

Q. 24. And the remaining portion of the load is taken on between Fifth & Vine and the end of the bridge?

A. Yes, sir.

Q. 25. What is the distance, if you know, approximately from Fourth & Walnut, to the Ohio River?

A. I would have to kind of guess at that by taking the squares, about four hundred feet to the square, would be about the distance. We have the exact measurement of that line to the foot. You say from Fourth & Walnut.

Q. 26. To the Ohio River?

A. I should judge in round numbers, about three thousand feet.

Q. 27. Approximately half a mile?

A. Yes, sir. We have got exact measurement of that if that is any help to you.

Q. 28. Over that distance, from the Ohio River to Fourth & Walnut—

A. You mean from Second Street.

Q. 29. From the Ohio River to Fourth & Walnut, and from Fifth & Vine to the Ohio River, these cars are operated by the C. N. & C.

A. Yes, sir.

Q. 30. And these negotiations that you have testified concerning, were really conducted by the C. N. & C. Railway Company, with the traction company over there?

A. It would be a renewal of the ordinance under that name.

Q. 31. The alterations or changes in the routes which were suggested by the C. N. & C. Railway Co., for the purpose of taking care of all the traffic handled by that company whether it originated in Kenton County, Ky., or Campbell County, Ky., or in Cincinnati, were they not?

A. The ones we suggested would eliminate in our judgment, a great deal of the congestion to the Covington lines. By changing the routes of the Covington lines it necessarily eliminated the great congestion on Walnut Street and on Main Street of the Newport lines, for the reason that the Covington and Newport lines, both now travel the same track between Fourth & Walnut and Fifth & Walnut. If we take half the cars off there, it will of course give Newport that much less congestion, and enable Covington to divide the congestion between the two lines.

Q. 23. How do the tracks and the facilities which the C. N. & C. Railway Co. now have in Cincinnati, compare with what they had at the beginning of the operation of the cars by your company in Covington—how do the tracks and facilities of the C. N. & C. Railway Co. in Cincinnati, compare with what they had at the time your company began the operation of cars in Covington—how do they compare with what they were formerly?

A. I think they are very greatly improved.

Q. 33. In what respect have they been improved?

A. In the first place the line we used to go on Walnut Street have been relieved of the entire congestion at that point by the removal of the Avondale line, and some other line, I have forgotten which just now, that used to go up Walnut Street. We induced them to place that line on Main Street. They run there.—I think they had from sixty to seventy-five cars in an hour there in rush hours. They took them off Walnut, and put them on Main.

Q. 34. I refer now to the tracks and facilities, as distinguished from the number of cars operated by each of the other companies on those tracks.

113 A. They have the same number of tracks. Then as a further relief from the congestion we agreed to pay the expense, our proportion of it, which was about eighty per cent of the whole of the construction of the track on Fifth from Fifth & Walnut south of the existing track, to enable our cars from Newport to go down Main Street, instead of running all those cars out Fifth Street from Fifth & Walnut, on a single track to Fifth & Broadway, and then down Broadway over to Newport. Going out Fifth Street there were so many cars of the traction company and ours and only one track to make the run for all, it simply blocked Fifth & Walnut and made it utterly impossible for us to get through, and then too, I went before the Council of Cincinnati and secured permission by consent of the traction company of Cincinnati, who backed me up to make this change, not only to relieve congestion at Fifth & Walnut, but also at all points from Walnut Street west. We are now running down Main Street, although our franchise required us to go out Fifth, until such time as the traction company can double track Fifth Street. That gives us more facilities to handle all lines in Cincinnati. Under the old way of handling cars over these six years ago we would not be able to run at all the same number of cars in my judgment, we are now running on both lines.

Q. 35. It is a fact, isn't it that the C. N. & C. Railway Co. had merely one loop or track leaving the Suspension Bridge going up Walnut and around Fountain Square, and coming back Vine, over which they handled the Covington cars.

A. Until the reconstruction of the Suspension Bridge, we came down Front Street and over that bridge, which you remember was only made for a wagon to go one way and a wagon to go the other, which frequently caused us delay. Our time allowed on the bridge was five minutes. We made a contract with the Suspension
114 Bridge Co. for the reconstruction of that bridge, which enables us to cut down our time from a minute and a half to two minutes, which was quite an increase in the trackage facilities in the handling of cars.

Q. 36. When did that remodeling take place?

A. I think we began crossing there in 1898 or 1899.

Mr. CASSATT: You mean over the remodeled bridge.

A. Yes sir.

Q. —. Since that time the C. N. & C. Railway Co. have not secured any additional tracks or facilities for handling of Covington cars in Cincinnati, except those you have described, by eliminating Cincinnati cars from a portion of the track used by it.

A. We have no other track facilities.

Q. 38. During that time, however, additional lines have been added which operate out of Covington and deliver their cars to the C. N. & C.

A. Yes sir.

Q. 39. What is the total number of cars on those lines so de-

veloped in that period, and how does that number compare with the total number of cars operated on lines which had been operated prior to that time.

A. You mean what has been the increase in service.

Q. 40. Yes.

A. By reason of the development of these new car lines since the remodeling of the bridge, referring to the Austinburg line, Holman, Rosedale, and Fort Mitchell, I would have to give that statement from my books. What you are trying to get at is the total increase in the number of cars operated?

115 Q. 41. Yes?

A. I would have to figure that up. You mean during the day or during the rush hours?

Q. 42. During the rush hours, say?

A. We can give exact figures on that, because I have got them. (Figures to be supplied by witness later.) I have got them from 1903 up.

Q. 43. I don't know that it is necessary to go back over each of the years to the present time. I suppose the increase has been proportionate throughout the new lines to what it *is* has been on the old lines?

A. Yes sir. There wasn't much difference, if I can remember rightly, now, between 1903 and what it was a few years prior to that time, they remained stationary.

Q. 44. Mr. Ernst, since the passage of this ordinance you have secured additional cars, I think, and placed them in operation?

A. Yes sir.

Q. 45. Were those cars ordered after the passage of this ordinance?

A. Yes sir, they were ordered afterwards. We had been in conference with the Bridge company for some time, looking to a change of their tracks. Mr. Shinkle would not make any agreement, and it was with a view of enlarging our cars, if possible, that we delayed making any specifications, and when we found out it was impossible to run larger cars, after giving it a trial, than our cars are at the present time, we then began to draw specifications for the present cars.

Q. 46. What is the total number of cars obtained by the company since the passage of this ordinance?

116 A. Fifteen.

Q. 47. You have expressed an opinion upon this ordinance, to the effect that it would not be satisfactory to the public, by reason of the long delays resulting to those who might desire to board cars after the number permitted by this ordinance had secured accommodations thereon: isn't it a fact that this objection could be eliminated by the operation of additional cars?

A. No sir, I don't think that would help it.

Q. —. You mean by that, that the operation of additional cars would not be practicable, in your opinion?

A. I don't believe the company can run any more cars with any better results than they are running now, under the same conditions existing in Cincinnati.

Q. 49. But the objection that cars would pass people who might desire to board them at different points in the City of Covington and compel those persons to wait long periods, could be eliminated by the operation of additional cars, could it not, every place, with the exception of Cincinnati and the loop in Cincinnati?

A. That would depend on the number of passengers that would want to board cars during the rush hours. Until that additional was handled, to relieve the congestion, I mean to relieve the number of people, those people would have to wait until a car came along with the requisite number of seats in it.

Q. 50. At such points as it was practicable to operate more cars, you could eliminate that objection by the operation of another car immediately behind the loaded car?

A. That would require of course, the same proportion of extra cars on each line. You couldn't fix up Madison avenue without
117 out fixing Holman, and you couldn't fix Holman without fixing Main, and all the balance of them. Every line would have to be added to to get that requisite number of cars to carry the people as defined by the ordinance.

Q. 51. But that is practicable?

A. I think it is thoroughly impracticable.

Q. 52. You mean during rush hours it is impracticable, by reason of the congestion which exists in Cincinnati?

A. And owing to the fact that those people all want to come home within forty-five or fifty minutes; you couldn't get enough cars under this ordinance, to handle these people in that time under any condition.

Q. 53. This condition only obtains by reason of the congestion existing on the loop in Cincinnati?

A. No sir, I say that passengers would object; were we to run by on a day that a man was in a hurry, or two or three women standing together, and all wanted to get on, the question is whether we would have to split those three,—whether we could permit one passenger and refuse the other two, or permit two and refuse one.

Q. 54. The objection that you make,—this objection you make to the ordinance, pertains to Cincinnati alone, by reason of the congestion existing there?

A. And I claim it would make the same objection to us on any car where people wanted to get on if there was room inside and plenty of it, as there would be under this ordinance, to accommodate that passenger if he wanted to go.

Q. 55. Your statement about three or four thousand persons
118 coming out of the office buildings in Cincinnati that you named, of course doesn't mean that those three or four thousand people are coming to Covington: it only means—

A. It meant to illustrate the enormous number of people that congregate at one point, all wanting to go home at one time.

Q. 56. Please explain what proportion of the travel of the Fort Mitchell and Ludlow Lines is outside of the City, bearing in mind your other testimony, or your testimony, that about seventy-five per cent of your business is interstate,—in other words, give me an

estimate of what business,—what proportion of the business on these two lines is business that originates outside of the City of Covington, and is carried entirely through Covington?

A. That data like that, almost impossible for *is* to tell what goes to Cincinnati, the only way we figure is how many people a day we carry on the Fort Mitchell line between the corporation line and the end of the line, because Fort Mitchell may come in here with so many people, she gets to Pike & Madison and Lewisburg, and those people may get off and load up and have the same load on when they go to Cincinnati. No way for us to tell what proportion of that outside travel goes to Cincinnati, but we could tell how many go from the corporation limits of Covington to Fort Mitchell and back. We couldn't estimate what proportion of people patronize that line, from the fact that the Fort Mitchell loads and unloads in Covington to Cincinnati.

Q. 57. Is that true also of Ludlow?

A. Yes sir, the Ludlow line will come over in the evening, drop five passengers here, and some at Fourth Street, and take on
119 ten at Fourth & Madison on transfers to come down. The load on the car would be ten more passengers than she has really got, according to the register.

Q. 58. Your statement that business outside of the City on the Fort Mitchell line, was about forty percent, I believe?

A. I guess that runs,—the way I figure that is this: taking the total number of passengers carried by the Fort Mitchell line and total number as shown carried from the corporation line, out and back, and varies all the way, according to the days and weather, from forty to sixty percent.

Q. 59. And the other, you say the Ludlow line sixty to seventy percent?

A. Yes, sir; the Fort Mitchell line for two weeks in April, from 4-20 to 6-40, for two weeks in the month of April, averaged twenty-four and twenty-eight passengers per car.

Q. 60. That is you mean out from corporation line?

A. Yes, sir, from Pike almost to the end of the line from 4-20 to 6-40, has averaged 26 97/100.

Redirect examination.

Mr. CASSATT:

Q. 1. Travel to Fort Mitchell, or that travel on the Fort Mitchell line outside of the City of Covington, is travel much lighter in winter than in summer?

A. Yes, sir, summer time we of course have got to take in consideration in making our figures, big Sunday travel, which is a pretty big item, but Fort Mitchell business after 7 o'clock in the evening, as you may know, per car per trip, amounts to nothing.

Q. 2. You were asked about whether the South Covington & Cincinnati Street Railway Co. operated in Cincinnati; your
120 statement was that the company operating in Cincinnati is the C. N. & C. Co.; do you mean by that, that there is any different management or operation of the actual cars?

A. No sir, only we operate there according to our franchise, under the name of Cincinnati, Newport & Covington Railway Company.

Q. 3. Except for the fact that the franchise in Cincinnati belongs to the C. N. & C. Railway Co., the operation of the cars in Cincinnati is by the same employes, under the direction of the same officers, and same cars as the South Covington?

A. Yes sir.

Q. 4. And the trips are continuous, without change of employes, or apparent change of any kind?

A. Yes sir.

Q. 5. So that as a matter of fact, the South Covington lines, and the South Covington cars, about which you have testified, all operate in Cincinnati, the same way as in Covington?

A. Actually so, yes sir.

Q. 6. The Cincinnati, Newport & Covington Railway Co. and the South Covington & Cincinnati Street Railway Co., are under the same ownership are they not?

A. Yes sir.

Q. 7. And they operate as a continuous system?

A. Yes sir, as one system.

Recross-examination:

Q. 1. The South Covington & Cincinnati Street Railway Co. has no property or franchise rights at all in the State of Ohio?

A. None.

121 Mr. CASSATT: It has a right to operate its cars by contract with the C. N. & C. Railway Co. in Cincinnati, over the route you have described?

A. Yes sir, the ordinance of the City Council of Cincinnati, is to the C. N. & C.

The further taking of these depositions is now adjourned until Tuesday, June 27, 1911 at 9-30 A. M.

THOS. H. TOWERS,
N. P. Kenton Co., Ky.

TUESDAY, June 27, 1911.

The taking of these deposition- is resumed, pursuant to foregoing adjournment.

The witness JAMES C. ERNST, deposes further as follows:

Direct examination.

Mr. CASSATT:

Q. 1. Mr. Ernst, when you gave your deposition the other day, you were asked the distance from Fourth & Walnut to the river, and you gave it to be half a mile, as I recall: what route did you have in mind in giving that distance from Fourth & Walnut?

A. From Fourth & Walnut to Fifth & Walnut, around Fountain square, down Vine to the Suspension Bridge, is what I figured on.

Q. 2. You mean the line taken by your cars from Fourth & Walnut?

A. Yes sir.

Q. 3. You were asked to furnish a statement of the cars,—number of cars operated on the Covington division during certain specified years: have you prepared that statement?

A. Yes sir.

Q. 3. Will you attach it to your deposition, marked Exhibit "A"?

A. I do so.

Q. 4. I hand you two papers, and ask you if these are copies of the charter of the South Covington & Cincinnati Street Railway Company, and of the ordinance of 1892, passed by the City of Covington, referred to in the petition, and the acceptance thereof?

A. Yes sir.

Q. 5. Will you please attach them to your deposition, marked respectively Exhibits "B" and "C"?

A. I do so.

(It is agreed by counsel that any attestation of these copies is waived.)

Q. 6. In Section 5 of the ordinance, Exhibit "C", October 7, 1892, there is a provision as to the intervals at which you are to run your cars in the City of Covington; I will ask you to state generally whether or not your company complies with that provision in the running of its cars?

A. We do.

(Objected to by defendants, as incompetent and irrelevant.)

Q. 7. Calling your attention to the ordinance which is involved in this case, viz., the ordinance of October 24, 1910, state whether or not you made any request for any hearing before the passage of that ordinance, in either the Council or Board of Aldermen, and if so, what, if anything was done about your request for a hearing?

A. I wrote to the Board of Aldermen, asking for a conference on the subject, before the same was passed.

Q. 8. Is this paper, which I hand you, a copy of that letter?

A. Yes sir.

Q. 9. Please attach it to your deposition, marked Exhibit "D"?

A. I do so.

Q. 10. Can you state briefly the circumstances under which this ordinance was passed,—I mean as to the time from its introduction until it was finally passed, and what opportunity, if any you had to make any protest?

A. The ordinance was first read on a Friday evening prior to its passage by Council. At that meeting one of the ordinances, which I presume is the first, was read, and after the reading was finished a second ordinance was introduced by Mr. Myers, that is, the present ordinance in which he claimed that after looking at the first one he had come to the conclusion that some error should be corrected, and that he prepared this ordinance which he read at that meeting of the

Council and Board of Aldermen, which, if I remember rightly, was on Friday evening. I objected to the passage without having an opportunity to have a meeting with the Council, as that was the first time I had heard the ordinance read, and I gave certain reasons why I thought the matter should be brought to our attention for discussion before they passed it.

(Objected to by defendant.)

Q. 11. What did they do that evening,—what did Council do that evening?

A. A short time after I finished a motion was made that it be adopted. If I remember rightly it was passed the next Monday night by Council.

Q. 12. When did the Aldermen pass the ordinance?

A. That I don't exactly remember, but I wrote that letter asking for a conference, to which I never received any answer. They passed it afterwards.

Q. 13. Did you receive any response to the letter marked Exhibit "D"?

(Objected to by defendant.)

A. I did not.

125 Q. 14. Or was any other opportunity given you for a hearing before the passage of the ordinance?

(Objected to by defendant.)

A. There was not.

Q. 15. You were asked the other day about whether the South Covington & Cincinnati Street Railway Company operated in Cincinnati; I will ask you to state in whose name the franchise in the City of Cincinnati are held, for the routes over which your cars operate?

A. The Cincinnati, Newport & Covington Railway Company.

Q. 16. Aside from the name in which the franchise is held in the City of Cincinnati, as you have stated, is or not the street railway line operated in Cincinnati under the same management and by the same company as in the City of Covington?

(Objected to by defendant.)

A. It is.

Q. 17. That company is the South Covington & Cincinnati Street Railway Company?

A. Yes sir.

Q. 18. Plaintiff in this case?

A. Yes sir.

Q. 19. Mr. Ernst, suppose it were practicable to transfer passengers who came into Covington from Cincinnati, to local cars after they get into Covington, what is the nearest point in Covington to the Suspension Bridge, where any such transfers could be made?

A. That would be at Court Avenue & Park Place.

Q. 20. Could such a system be followed without revolutionizing

126 your whole system of tracks in the region of Court Avenue and Park Place?

A. I don't understand your question.

Q. 21. Could such a system of transferring from the Cincinnati cars to the various lines at Court Avenue & Park Place, be practically carried out?

A. No sir, could not.

Q. 22. What points are there in Covington where transfers are regularly made from one line to another?

A. Third & Court, Fourth & Madison, Pike & Madison, Eleventh & Madison, Twelfth & Greenup.

Q. 23. At those points are transfers made to more than one line, or are there several lines that intersect at those various points?

A. Transfers are made at those points to all lines to which transfers entitle them to passage.

Q. 24. I will ask you to state Mr. Ernst, whether it is possible for your Company to determine from day to day, and especially on Saturdays and Sundays and holidays, how great the transfers will amount to in number at those points, or to what lines the passengers will desire to transfer?

A. We have no knowledge of that.

Q. 25. Is it possible to obtain any such knowledge in advance of their arrival there?

A. No sir.

Q. 26. Are the transfers at those points large in number or small?

A. They will vary from day to day.

Q. 27. Do they amount in some days to a large number?

A. Quite a large number.

127 Q. 28. I want now to call your attention, or have you testify with reference to whatever contingencies there are in the operation of your lines in Covington, which vary the demand on your cars from day to day, if any: first, what is the effect upon the morning travel at the morning rush hours, of any inclement weather?

A. Increases our travel.

Q. 29. Little or otherwise?

A. Very considerably.

Q. 30. Is this dependent on a confirmed state of the weather, or would it arise from sudden showers or snow storms?

A. It arise- from rains, and snow storms.

Q. 31. Is it possible for your company to forecast the proportions of the morning travel in such a way as to be able to comply with this ordinance as to the furnishing of cars at the rush hours in the morning.

A. No sir.

Q. 32. How about local travel in the evening in Covington,—how is that affected by the state of the weather?

A. Affected the same way; people that walk, when it rains or snows, we are compelled to carry them without notice, especially in sudden rain storms, we are virtually swamped.

Q. 33. How about theater travel from Covington to Cincinnati in

the evening: is it possible for your company to forecast the proportions of that travel, so as to provide for it in accordance with the terms of this ordinance?

A. No sir, we have no means of ascertaining what that will be.

Q. 34. Where is the Lagoon located?

A. In the western end of Ludlow.

128 Q. 35. Does any of your car lines which go through Covington go to the Lagoon?

A. Yes sir, the Ludlow line.

Q. 36. Is there any other car line of your company going to the Lagoon?

A. No sir.

Q. 37. What is the Lagoon?

A. Pleasure resort.

Q. 38. An amusement park?

A. Yes sir.

Q. 39. I will ask you to state during what portion of the year that park is open and in operation?

A. During June, July and August.

Q. 40. Is it ever possible for your company to forecast from day to day the amount of travel from Covington to the Lagoon?

A. No sir.

Q. 41. Does it or not vary from day to day?

A. Varies very considerably.

Q. 42. In view of that fact is it possible for your company to provide in advance for accommodations sufficient to comply with the terms of this ordinance?

A. No sir.

Q. 43. Where is the Latonia Race Track situated?

A. South end of Covington.

Q. 44. The entrance to the track and your terminal at the track, are in the City of Covington, are they not?

A. Yes sir.

Q. 45. When do the race meetings occur at the Latonia Race Track?

A. In the spring and fall.

129 Q. 46. Do any of your car lines run to the Latonia Race Track?

A. Yes sir.

Q. 47. What line?

A. Covington and Latonia.

Q. 48. Do you run cars during those race meetings?

A. Yes sir.

Q. 49. To the Latonia track?

A. Yes sir.

Q. 50. Are there any other car lines of any company that go to the Latonia Race Track?

A. No sir.

Q. 51. Are you able to state in a general way, about how many people attend that race track in the course of an afternoon?

A. We can only tell from day to day.

Q. 52. Is the number the same every day?

A. No sir, it varies considerably.

Q. 53. How great is the variation,—does it extend into the thousands?

A. It will vary some days a thousand, some days like Saturday will vary two thousand, depends on the character of the races, and weather.

Q. 54. Are you able to tell in advance of the actual presence of the people, how great a crowd will go to the race track on your cars on any given afternoon?

A. No sir.

Q. 55. Do the same number of people come back from the race track on your cars that go out?

A. It varies considerably, some days considerably less.

130 Q. 56. What other method is there for people to get to the race track, who might take your cars?

A. Railroad trains.

Q. 57. Are you ever able to tell in advance, what proportion of the crowd is going to use the train either way, and what proportion will use your street cars?

A. No sir.

Q. 58. Do these races terminate at the same hour every day?

A. No sir.

Q. 59. How much does the hour of closing vary?

A. I judge all the way from twenty-five to forty minutes, probably, average between thirty and thirty-five minutes.

Q. 60. Do all the people wait until all the races are over before demanding opportunity to go home?

A. Some few come out, it varies considerably, as to the character of the races. We don't know what varies it,—I don't.

Q. 61. But it does vary?

A. Yes sir, varies considerably.

Q. 62. Have you ever observed the conduct of the crowds at the close of the races in their efforts to get on your cars?

A. I think Mr. Green would answer that question better, I am not there.

Q. 63. Outside of the Lagoon travel, and the Latonia Race Track travel, what other occasions are there which affect the amount of travel which you are called upon to accommodate from day to day,—

how about, for instance, funerals at the cemeteries on the Fort Mitchell line, or picnics or festivals? State anything that occurs to you in that connection.

A. There are a number of holidays occurring through the year, which affect us by not knowing the character of the people or where they are going, as well as visiting travel between the two counties, or picnics, celebrations, or special occasions which may arise, will throw travel from one point to another without any knowledge on our part to enable us to handle it.

Q. 64. In view of these various conditions about which you have testified, I will ask you to state whether or not it is possible for your company to furnish cars to the various lines in such num-

bers or with such accuracy, as to accomodate travel in accordance with the terms of the ordinance?

A. No sir.

Q. 65. This ordinance makes exception of the 4th of July, Labor Day and Decoration Day; I will ask you to state whether there are any other days than those mentioned, where your travel is as great on those days, and as difficult to forecast?

A. There are frequent occasions at the Lagoon, on which it would be utterly impracticable to forecast the crowd or handle the crowd according to that ordinance, cemetery or Saturday or Sunday travel, which varies considerably, as we never can tell to what point the people are going.

Q. 66. Is there any substantial difference in the amount of people carried, or in the uncertainty of where they are going, between Labor Day, the 4th of July and Decoration Day on the one hand, and Saturday and Sunday on the other hand, especially during the summer?

A. You mean are there as big days as to our ability to
132 comply with the ordinance?

Q. 67. Yes.

A. There are any number of Saturdays and Sundays, sometimes on Thank-giving Day and Halloween night, celebrations in one town or another, puts us in the same position we would be on Decoration Day, 4th of July or Labor Day.

Q. 68. Mr. Ernst, are there any grade crossings which your lines cross in the City of Covington?

A. One at Pike & Russel, Seventeenth & Madison, two in Latonia.

Q. 69. Are the last two mentioned in Covington?

A. Yes sir.

Q. 70. What is the experience of the Company as to delays of your cars at those points?

A. They are very frequent, some of them very extended in time.

Q. 71. Are you able to give any particular instance or any particular period?

A. The last six months,—I suppose any month would show very heavy delays, running all the way from six to fifteen and seventeen minutes.

Q. 72. About how many in the course of a month, would you say?

A. They run all the way from twenty to thirty.

Q. 73. In the course of a month?

A. Yes sir.

Q. 74. What is the effect of such delays of your cars upon your schedules, and upon the service?

A. It disarranges them; the entire service is affected by delay at those different points on those lines.

Q. 75. What is the effect of those delays upon your ability
133 to comply with this ordinance as to furnishing cars in accordance with its terms?

A. We could not get cars out when those delays occur, to take place of those cars, to comply with that ordinance.

Q. 76. These crossings referred to are steam railroad crossings?

A. Yes sir, railroad grade crossings.

Q. 77. What other things, if any, occur to you that interfere with the regularity of your schedules and of the operation of your cars?

A. There is wagon delays and parades, funerals, most important ones of those which delay the cars.

Q. 78. Your company is the only company that operate in the City of Covington?

A. Yes sir.

Q. 79. Plaintiff company?

A. Yes sir.

Q. 80. There are no theaters or hotels in Covington, are there?

A. There are no hotels that I know of.

Q. 81. Are there any theaters in the general acceptance of that term?

A. No sir, except what is known as the "Colonial." No regular theaters,—nothing but moving picture shows.

Q. 82. Are there any hotels in Covington?

A. Not that I know of.

134 Recross-examination.

MR. SHEPARD:

Q. 1. How does the travel out of Covington, that is, that originates in Covington, to the Lagoon, compare with the travel coming out of Cincinnati going to the Lagoon?

A. That varies considerably.

Q. 2. Please explain what causes this variance?

A. It is the people.

Q. 3. Any substantial increase in the proportion of travel from Covington is caused by some particular attraction at the Lagoon, which is advertised more or less extensively, in Covington, is it not?

A. I don't think so, it is the whim of the people.

Q. 4. That is to say, if there are any local organizations or attractions that appeal particularly to the people of Covington more than to those of Cincinnati, they are advertised, so that the company would have some notice of them, are they not?

A. Doesn't seem to have any effect on the attendance, difference between Cincinnati and Covington.

Q. 5. Can you approximate the relation that the Covington travel bears with Cincinnati travel to the Lagoon?

A. No sir, we can't approximate that, make an estimate of it without we would check up each day separately.

Q. 6. Is the majority of the travel from Cincinnati or from Covington?

A. I should say the large majority is from Cincinnati.

Q. 7. How with reference to the travel to the race track?

135 A. Very big majority is from Cincinnati.

Q. 8. The Lagoon is situated just outside of the City of Ludlow, is it not?

A. I don't know whether it is just outside or just in.

Q. 9. It is necessary to pass entirely through the City of Covington and through the City of Ludlow, to get to the Lagoon?

A. Yes sir, to get to the Lagoon.

Q. 10. The Lagoon is open practically the same length of time each year, is it not?

A. Practically, yes sir.

Q. 11. How many race meetings are there held at Latonia each year?

A. Two.

Q. 12. They are about the same duration each year?

A. About, yes sir.

Q. 13. Do any of the franchises of the plaintiff company under which it operates in Covington, contain any obligation with reference to the accommodation of the travel from Cincinnati to the race track, or from Cincinnati to the Lagoon?

A. Yes sir.

Q. 14. When a car of your company is delayed by blockade at these grade crossings to which you refer, the other cars which are following the first car blockade in the schedule, come on up to the blockade, do they not?

A. Yes sir.

Q. 15. So that if the first car is delayed the second car is that much closer to it?

A. That much closer.

136 Q. 16. Mr. Ernst, that portion of the tracks over which the C. N. & C. Railway Company handles cars of the South Covington & Cincinnati Street Railway Co. in the City of Cincinnati, on Walnut Street, between Fourth and Fifth, is used for handling all the cars of the South Covington & Cincinnati Street Railway Co. operated south of the Ohio River, is it not?

A. On Walnut between Fourth and Fifth, yes sir, with the exception of some few cars which we run to Pearl & Broadway for one trip each for Newport business,—with the exception of four cars one trip each.

Redirect examination.

MR. CARRATT:

Q. 1. Speaking of the Lagoon travel, can you recall any special instance where some attraction at the Lagoon, specially advertised in Covington and Newport, failed to attract crowd anticipated?

A. During the previous week we paid our proportion of the cost of hiring a ladies' band of twenty-five pieces, put banners on the cars, and run them through Newport and Covington, and the attendance was a rank failure from the day they began to the day they stopped. The next day, Saturday, and Sunday,—I don't know what they had down there, I didn't pay any attention to it,—Saturday night and Sunday Covington people seemed to go there from every direction.

Q. 2. These Newport cars which run north on Walnut street in

Cincinnati, have been referred to: have you any other way to take them through Cincinnati except the one you have on Walnut Street?

A. No sir.

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EXHIBIT A.

Deposition of J. C. Ernst, 6-27-11.

Greatest Number of Cars Operated on the Covington Division During the Years Mentioned.

	1903.	1904.	1905.	1906.	1907.	1908.	1909.	1910.
Main	7	7	7	7	8	7	8	8
Ludlow	8	8	9	10	9	9	9	10
Madison Avenue.....	6	6	6	6	6	6	6	6
Greenup	10	10	11	10	9	9	9	9
Holman	4	4	7	7	6	6	7	8
Lewisburg	3	6	6	6	6	6	7	8
Rosedale	3	3	5	6	7	7	9	10
Audtinsburg	0	0	0	0	3	4	4	5
Belt Line	4	4	4	4	4	4	4	4
Total	45	48	55	56	58	58	63	68

138 An Act to Incorporate the South Covington and Cincinnati Street Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION ONE. That E. F. Abbott, B. R. Morton, W. O. Ford and S. C. Hermes, or those of them who shall act, their associates, successors, or assigns, be, and are hereby, created a body corporate and politic, with perpetual succession, under the name and style of The South Covington and Cincinnati Street Railway Company, and in such name to have full power to contract and be contracted with, sue and be sued, construct operate and manage street railways in the City of Covington and vicinity.

SECTION TWO. Said company shall have a capital stock not to exceed two hundred thousand dollars, divided into shares of fifty dollars each.

SECTION THREE. The business of said corporation shall be the construction, operation and management of street railways in the City of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to, and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way cannot be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at

any time, by agreement, purchase, lease, consolidate with,
139 acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof.

SECTION FOUR. Authority is hereby given to the company to cross the tracks of any other company; also to connect with and use the track of any other railway company in the city of Covington and vicinity, on equitable terms—that is, to pay such company a fair compensation for the use of such track. In the event a mutual agreement cannot be effected with such other company for the use of such part of its tract as desired, then such use may be condemned by proceedings under a writ of *ad quod damnum*, as provided in chapter 110, entitled "Turnpike, Gravel and Plank Road" in the General Statutes.

SECTION FIVE. The Board of directors shall consist of not less than three nor more than five, as shall be determined from time to time by the By-laws that may be ordained by the Board of Directors, also which shall prescribe the time, manner and place of their election. Each share of stock shall entitle the holder to one vote, either by himself or proxy, in writing, and the person having the highest number of votes shall be declared elected.

SECTION SIX. The corporators in the first section mentioned, their associates, successors or assigns, shall organize said company, and shall constitute the first Board of Directors. The board shall elect one of its members president, and such other officers as may be deemed advisable; and may fill all vacancies occurring in the

140 board; and may appoint such agents and employes as may be desired, and prescribe their duties and fix their compensation; and may make all necessary by-laws and rules for the management of the company; and may purchase and hold such real and personal estate, routes, railway tracks, bonds, notes, or obligations as may be deemed requisite for its use, and sell, convey and exchange the same at pleasure; and may dispose of stock from time to time, and reissue such as may be acquired in the course of its business, whether taken for liens, debts or otherwise; they may borrow money on the credit of the company, at a rate of interest not exceeding ten per cent, per annum, and may execute the notes or bonds of the company, and sell or dispose of the same, when deemed advisable, for the use and benefit of the company; and to secure the payment thereof, or of any indebtedness of the company, may mortgage or pledge the whole or any part of the property, income and franchise of the company.

SECTION SEVEN. The company shall have the right to charge reasonable rates of fares for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment, such passenger may be excluded therefrom, provided the company shall have the rate in print posted up in the cars.

SECTION EIGHT. The president shall be the chief officer of the company, and shall perform such duties and possess such powers, and

receive such salary or compensation as the board may from time to time prescribe.

SECTION NINE. This act shall be in force from its passage.

141

W. J. STONE,

Speaker of the House of Representatives.

JNO. C. UNDERWOOD,

Speaker of the Senate.

Approved January 25th, 1876.

JAMES B. McCREARY.

By the Governor.

J. STODDARD JOHNSTON,

Secretary of State.

142 An Ordinance in Relation to the South Covington and Cincinnati Street Railway Company.

1. Be it ordained by the Common Council of the City of Covington, That in consideration of the South Covington and Cincinnati Street Railway Company, within twenty days after the acceptance of this ordinance, reducing and maintaining during the term of the contract period herein provided for a reduced cash fare of five cents, and no more, for one continuous ride upon its cars from any point on its lines in the city of Covington, as the said corporate limits now are or may hereafter be extended, to Fourth street or to Fountain Square, in the City of Cincinnati, and from Fourth Street or Fountain Square, in the City of Cincinnati, to any point upon its lines in the City of Covington, as its corporate limits now are or may hereafter be extended, it being understood that the said company shall carry passengers to Fountain Square, in the said City of Cincinnati, only in case it shall continue to operate its lines to said Fountain Square, otherwise to Fourth Street in Cincinnati; the transferring from one car or line to another car or line shall be held to be a continuous ride, and said company shall transfer in accordance with the provisions of an ordinance of August 5, 1889, that is: All lines running north and south shall transfer to those lines running east and west, and all lines running east and west shall transfer to those lines running north and south, and in consideration of the said company, within six months from the passage of this ordinance removing its tracks from Scott street south of Fourth street to the southern terminus of said track, and putting said street back in as

143 good condition as the rest of the street, and to the satisfaction of the common council, and double tracking Greenup street from Second to Powell streets, thence with a single track along what is known as the Austinburg extension around to Seventeenth street and Greenup, also a double track from Powell and Greenup south on Greenup to Seventeenth street, except where the street is less than thirty-five feet in width in Patten's subdivision, which distance shall have a single track, thence south from Seventeenth and Greenup with a double track along Greenup to State, thence with a double track west on State street to Madison Avenue,

and shall electrically equip and operate all these routes heretofore as hereafter named in this ordinance with modern electric cars and appliances, and put back all streets where tracks are removed or laid in as good condition and with the same materials as the rest of the streets, and to the satisfaction of the common council and according to the direction of the city engineer.

The double tracks on Greenup and State streets are to be placed as near the center of said streets as it is consistent with public safety and convenience, and in consideration of the said company, within ten months from the acceptance of this ordinance, removing its tracks from Powell street, between Madison Avenue and Greenup Street, from Seventeenth street, from Greenup to Scott, and from Banklick from Pike to Fifteenth street, and from Fifteenth street from Banklick to Russell, replacing said streets in as good condition and with the same material as the rest of the said streets, and to the satisfaction of the common council; and in further consideration of the said company removing its tracks from Cooper street, between Madison Avenue and Scott Street, and replacing said street in as good condition as the rest of the street, and with the

144 same material, to the satisfaction of the common council and according to the direction of the city engineer; and in further consideration of the said street railway company releasing the said city of Covington from all claims for loss, expense or damages by reason of the reconstruction of its tracks on the streets now being made with asphalt, the city of Covington does hereby agree, for a period of twenty years from and after the date of the acceptance of this ordinance by said street railway company, that it will not offer for sale or sell, or attempt to sell, any of the rights, franchises, rights of way or privileges now held, used or enjoyed by said Street railway company in the city of Covington, and to that end the resolution passed by the city council of the city of Covington on the eleventh and eighteenth days of September, 1890, directing the sale of certain rights, is hereby withdrawn, and the suit now pending in the Circuit Court of the United States for the Sixth Judicial District and District of Kentucky at Covington, to-wit: The South Covington and Cincinnati Street Railway Company complainant, vs. The City of Covington, defendant, and the suit of W. A. Goodman, trustee, complainant, vs. The City of Covington, defendant, in the same court pending, shall be prosecuted to a final determination and judgment or judgments, which shall fix and determine the rights of the litigants; provided, however, that if the court in which the said suits are pending should, after the passage and acceptance of this ordinance, refuse to hear or try the issue of said cause or causes, or should dismiss the said causes without deciding the question at issue therein, or trying said cause, should decide the issue in favor of the city, then, and in either of the said events, the

145 city hereby agrees to postpone the enforcement of any of its claimed rights to sell any of the franchises of the said company for a period of twenty years from and after the acceptance of this ordinance; and during said period of twenty years it will not attempt to sell or offer to sell any of said franchises; and should said

court decide against the city, or any court to which the question may come decide adversely to the city, then said company will not take or use any advantage of said decision until the expiration of the term of twenty years herein granted said company. It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by said company, and are now the subject of litigation between the said city and the said company; but it is distinctly understood and agreed by both the said city and the said company that said city and said company will, if the court in which said suits are now pending, should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have question between said city and said company determined in the court in which the said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties thereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by

146 said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company. It is further understood and agreed by both the city of Covington and the said street railway company that neither said city nor said company, by the passage and acceptance of this ordinance, in any way admits, waives, relinquishes, prejudices or affects their respective rights and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits. The agreement between the said street railway company and the said city of Covington, as above provided, is made upon the following terms and conditions, and all of them viz:

1st. That the said South Covington and Cincinnati Street Railway Company shall, within twenty days after the acceptance of this ordinance, reduce the rate of fare for carrying passengers from any points on its line within the limits of the City of Covington as the said corporate limits now are, or may hereafter be extended, to any point on its line in the city of Cincinnati, as hereinbefore provided, or from any point on its line in the City of Cincinnati, as hereinbefore provided, to any point on its line within the corporate limits of the said city of Covington, as the corporate limits now are or may hereafter be extended, to a five-cent cash fare, and no more, for each passenger, and to maintain the said reduced rates of fare during the compromise period herein agreed upon, to wit: Twenty years from and after the acceptance of this ordinance, and in consideration of the said reduced rates of fare between the said cities of Covington and Cincinnati the said street railway
147 company may charge and collect a five-cent cash fare, and no more, for passengers riding on its lines within the present or future corporate limits of the city of Covington.

2d. It is the agreement by said company with the city of Covington

ton that the five-cent fare shall apply to and extend over each and every line of street railway in the city of Covington, on and over which the cars of said company may run or be operated during the terms herein granted, not only within the corporate limits of the city, but to and from Cincinnati.

3d. The cars on Greenup street and Madison Avenue shall be operated as a belt line over State Street, so that the cars shall pass both ways on said streets.

4th. The said South Covington and Cincinnati Street Railway Company shall also run its cars out on Lexington Pike at least five hundred feet south of the intersection of Pike and Twelfth streets within sixty days after the city gets possession of said pike, and the right is hereby given said company to so extend its line when the city has obtained control over said road.

5th. The said street railway company shall, within six months after the passage of this ordinance, remove its track from Scott street, south of Fourth street, and from Cooper street, between Madison Avenue and Scott Street, and shall connect its track on Pike street with the track of the said railway as now laid on Madison Avenue and Pike Street, so that the cars of said company may pass to and from the tracks on Pike street and Madison Avenue, and shall double-track Greenup street, as above provided, and extend its

148 single track along what is known as the Austinburg extension around to Seventeenth and Greenup; also a double track from Powell and Greenup south on Greenup to Seventeenth, except where the street is less than thirty-five feet in width, in Patton's subdivision, which distance shall have a single track, thence south from Seventeenth and Greenup with a double track along Greenup to State, thence with a double track west on State street to Madison avenue; and said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6 A. M. to 5 P. M., and not to exceed five minutes from 5 P. M. to 8 P. M., and not to exceed ten minutes from 8 P. M. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart; and said street railway company shall have the right to lay and maintain tracks so as to connect its present system of tracks at the corner of Madison avenue and Fourth street with the railway track to be constructed on and over the proposed new bridge over the Ohio river, the Covington end of said proposed new bridge being at Fourth street and Madison avenue, in the city of Covington, Ky.

6th. The said street railway company shall, at its own expense, lay such foundation under its tracks, over which cars are operated by electricity as aforesaid, as have been recently under and along Madison avenue, from Fourth to State streets, and the work shall be done to the entire satisfaction of common council, and the said company shall put back any street from which its tracks are removed, or on which its tracks may be laid, in as good condition as the rest of the street. The city reserves the right to change the grade of the streets over which said railway routes

are located, both as to curve and crown of the same, and the said railway company shall defray the expense, at any time the council may direct, of lowering or elevating such tracks as to conform to the said change of grade, and place a foundation such as is hereinbefore provided for; and further, the said street railway company shall operate all its lines by electricity as a motive power, using no horses or mules, and all poles to be hereafter erected by said company shall be of iron or steel, both along the new routes, and also along the old, when new poles are needed, and so placed as not to interfere with or obstruct driveways. And the city of Covington expressly reserves the right and power to require all the wires of said company used overhead to be placed under ground at the expense of the company whenever deemed proper or expedient, and the South Covington and Cincinnati Street Railway company also can, upon thirty-days' notice in writing to the mayor of the city, put the said wires under ground whenever it so determines, unless sooner ordered by the city of Covington; and the said street railway company binds itself to replace all streets where the wires are put under ground at its own expense and to the satisfaction of the common council. That from and after the period of five years from the acceptance of this ordinance by the street railway company, said company shall contract for and adopt the best mode and manner of rapid transit, and the best way and manner then obtainable between the cities of Covington and Cincinnati, it being understood that the said company shall then use the bridge or bridges between said cities which shall at the time afford the best

150 facilities for rapid transit between Covington and Cincinnati; and if after the expiration of the period of five years there is no better mode of rapid transit between the cities of Covington and Cincinnati across the Ohio river, the said company or its successors or assigns shall, as soon thereafter as a more rapid mode can be obtained adopt and use said mode. And whatever tracks along its routes in the city of Covington are not in operation, as herein provided, after a period of ten months from the passage of this ordinance, shall be removed at the expense of the street railway company, and the streets put back immediately, where said tracks have been removed, in as good condition as the rest of the street, and with the same material, and whatever portion of the routes that are not, after a period of ten months from the acceptance of this ordinance, equipped and operated in the said city of Covington with electricity, shall be forfeited to the said city of Covington.

7th. That the said street railway company shall release the city of Covington from any and all claims for damages loss or expense incurred by it for or on account of the said street railway company in removing or relaying its tracks on the streets in the city of Covington, now being or hereafter to be made with asphalt, under the provision of a resolution passed by the common council of the said city on the fifteenth day of October, 1891, requiring said improvements to be made by said street railway company, and the said street railway company shall continue to remove and relay its

tracks and place the foundation as required, at its own expense, under and over the streets now ordered to be improved with asphalt, until the said work is completed.

151 2. In consideration of the said street railway company removing its tracks from Scott Street, Powell street, Seventeenth Street, Cooper street, Banklick street and Fifteenth street, and double-tracking Greenup Street and State street, as hereinbefore provided, the said City of Covington agrees and covenants with the said South Covington and Cincinnati Street Railway Company, its successors and assigns that it will not grant to any other company or companies, corporation or corporations, association or associations, individual or individuals, any right, privilege or franchise to lay, maintain or operate its street railroad or street railroad track, or any other system of passenger traffic, on or over the streets so abandoned without giving to the said street railway company the same rights and privileges that are enjoyed by any other company, corporation, association or individual on the said streets, or any of them; the term of the joint use to be settled by arbitration, each party to select one, and these two a third party, who shall decide all differences. The City of Covington expressly reserves the right to exact a bonus or consideration from this company, as well as all others, for the use of such streets as are now abandoned by this ordinance, as well as for the use of all other streets that may be hereafter granted. The City reserves the right to permit any companies to cross the tracks of the said South Covington and Cincinnati Street Railway Company wherever located.

3. The said street railway company shall, upon notification from the mayor of Covington that the City is prepared to proceed with the improvement of State street, between Madison avenue and
152 Greenup street, and Greenup street between Seventeenth and State streets, proceed immediately after notification to lay the proper foundation under the tracks, and lay its tracks on State street, between Madison avenue and Greenup street, and Greenup, between Seventeenth and State.

4. The terms and conditions of this ordinance shall be accepted in writing by the said South Covington and Cincinnati Street Railway Company within twenty days after the passage of this ordinance, and the said acceptance in writing shall constitute this ordinance a contract between the said street railway company and the city of Covington for the purposes herein provided.

5. If at any time the South Covington and Cincinnati Street Railway Company fails or refuses to comply with the terms and provisions, or any part thereof, of this ordinance, the common council can, upon twenty days' notice being given of such breach, order the tracks of the said company to be removed from the said streets which are named herein for its new tracks, and upon failure of said company to remove the same, the said city can remove them at the cost of said company, and the said City of Covington reserves the right to repeal this ordinance for any breach of the same after twenty days' notice to the said company.

It is understood and agreed that the rights obtained under this

contract and ordinance can not be assigned or sublet without the consent first being obtained from the common council of the city of Covington.

6. The right to tear up the tracks, or have the same done, for the purpose of improving or repairing sewers or laying gas or water pipes, or repairing the same, or making house connections
 153 with the same, or making any improvements, or doing any work which necessitates the tearing up of tracks, or displacements of wire, or removing of poles, is reserved to said city, and may be exercised by it after a reasonable notice to said company, and the said company shall, at its own cost, replace said tracks, wires, poles, etc.

7. The said street railway company shall, before this ordinance takes effect and before said company acquires any rights under this ordinance, file with the city clerk a bond, to be approved by the common council, with resident state sureties, in the sum of \$25,000, that it will save the city harmless from any and all loss or damage or cost to persons or property by reason of the construction and operation of said railway, and also conditioned for the faithful performance and carrying out of all provisions of this ordinance; and the common council can at any time require new or additional securities upon said bond, and the said bond shall at all times be subject to the approval of the common council; and the remedies secured to this city by this bond are additional to the other remedies in this ordinance to the city.

8. The said company shall dedicate to the city and open for public use for street purposes the south half of Sixteenth Street, between Scott and Madison avenue.

9. The said company shall pay to the said City of Covington each year during the first five years of the period of this contract the sum of \$2,600, and each year during the second period of five years of the period of this contract the sum of \$4,000, and each year during the third five years of the period of this contract the
 154 sum of \$5,000, and each year during the fourth five years of the period of this contract the sum of \$6,000, which yearly payments shall be in lieu of any and all car licenses or bonus. These sums shall be paid one-half on the fifteenth day of June and one-half on the fifteenth day of December, in each year. The said railway company shall, within ten months after the acceptance of this ordinance, electrically equip and operate what is known as the Third street route, beginning at Third street and Madison Avenue, and extending west on Third street to Bullock street, and north on Bullock street to Second street; and the company shall extend its said lines west on Second street, from Bullock to the west corporation line of said city, and to lay proper turnouts on said line as it is now constructed or may be extended, so as to permit and facilitate the running of cars in opposite direction on said line. And permission is given to said company to connect its tracks at Fourth and Main streets with the tracks to be laid on the bridge of the Covington and Cincinnati Elevated Railway and Transfer and Bridge Company.

10. In full settlement and satisfaction of all claims of the City of Covington against said company on account of unpaid car licenses and bonus arising prior to the year 1893, the said company shall pay the city of Covington the sum of \$1,500 immediately after the acceptance of this ordinance.

11. All the cars operated on the Greenup, Madison and State street line running over the river, shall be operated as follows.

155 One-half the cars on leaving the suspension bridge shall proceed south on Madison Avenue, east on State street, and north on Greenup over the river, the other half of the cars shall on leaving the bridge proceed south on Greenup to State, west on State to Madison, and north on Madison on over the river.

12. Before a double track is laid on State street, from Greenup to Madison, as hereinbefore provided, State street shall be widened between said points, at the expense of the company to a width of not less than forty feet between the curbing, with an eleven foot sidewalk on each side of said streets; provided, however, if the land necessarily required to widen said street can not be purchased at just or reasonable prices, then said company must, within sixty days after the passage of this ordinance, produce to the common council of the city of Covington satisfactory evidence that it can not purchase sufficient ground at reasonable or just prices from the owners of the same; then the city will proceed to condemn said land to widen said street, and when said land is condemned the car company shall pay all costs and damage of acquiring said land by said condemnation proceedings; the street car company to have the right to lay, maintain and operate a single track on State Street between Greenup and Madison streets, until State street is widened so as to permit the laying of a double track on said street.

13. Said company, instead of operating its Austinburg line as it is now operated, shall extend its track out Edward Street to the corporation line, thence west along the corporation line to Garrard Street, thence north on Garrard street to State street, thence west on State street to Greenup street, provided, however, that the

156 construction and operation of this line by said company shall operate as a surrender to the city of Seventeenth street, from Edward to Greenup; and provided, further, that every alternate car which passes over said line shall pass down and over Madison avenue; and failure to comply with this provision shall also be taken as a breach of this ordinance.

14. In case the right of franchise has not been settled by the courts at the end of the term of this ordinance, then said street car company shall continue to pay semi-annually, as above provided, the sum of \$7,500 per year until said suits are finally determined; and further, that the said company binds itself that the reduced rates of fare mentioned in this ordinance shall continue until said suits are settled.

Approved October 7, 1892. No. 942.

- 157 Called Meeting of the Board of Directors of the South Covington and Cincinnati Street Railway Company.

Present, Messrs. E. F. Abbott, John A. Williamson, Samuel Bigstaff and C. B. Simrall.

The President being absent, the Vice President, E. F. Abbott, took the chair.

C. B. Simrall presented an ordinance passed by the Common Council of the City of Covington, entitled "An ordinance relating to The South Covington and Cincinnati Street Railway Company," which ordinance was approved by the Mayor on the 7th day of October, 1892. On motion of Mr. Bigstaff, seconded by Mr. Simrall, the following resolution was adopted:

Resolved. That the ordinance passed by the Common Council of the City of Covington, entitled "An ordinance relating to The South Covington and Cincinnati Street Railway Company," which was approved by the Mayor on the 7th day of October, 1892, be, and the same, is, hereby accepted by The South Covington and Cincinnati Street Railway Company.

Be it Further Resolved. That the Secretary of the company be instructed to file a copy of this resolution with the Common Council of the City of Covington, as evidence of the acceptance of the said ordinance by the said company.

I hereby certify that the above is a true copy of a resolution adopted by the Board of Directors of The South Covington and Cincinnati Street Railway Company, this 18th day of October, 1892.

G. M. ABBOTT, *Secretary*.

I hereby certify that the foregoing acceptance was on the 26th day of October, 1892, received by me as city clerk of the City of Covington, from the secretary of The South Covington and Cincinnati Street Railway Company, and was, on same day, filed by me with the Common Council of the City of Covington.

Given under my hand this 26th day of October, 1892.

J. T. VON HOENE.

City Clerk.

158

OCTOBER 26, 1910.

To the Board of Aldermen of the City of Covington, Ky.

GENTLEMEN: An ordinance has been passed by council and is now before you, to regulate the number of passengers to be carried on street cars and the number of cars to be operated by the company for the carriage of passengers and for other purposes therein set forth.

This ordinance in its present form was submitted to Council on the tenth day of October, 1910, and was passed at the same meeting.

We respectfully request that before your body acts upon this ordinance it be referred to your appropriate committee for consider-

ation by them for the purpose of giving us and our counsel a hearing.

This ordinance is drastic in its provisions and far reaching in its consequence for the traveling public and for the company. We believe that it is not only a violation of our rights under our ordinance but that a compliance with it would be utterly impossible. Furthermore, if the company should endeavor to comply with it as far as it is physically possible to do so, it would result in great inconvenience and discomfort to the traveling public.

It is but fair and just that we should be given an opportunity to lay before you the facts in support of our position, both as to the practicability and the legality of this measure. What we request is nothing more than the usual practice of your Board and 159½ of other City Councils with reference to important measures.

Respectfully,

(Signed)

J. C. ERNST, *President*.

Copy. 6-26-'11. F. R.

160 STATE OF KENTUCKY,
Kenton County, ss:

I, Thos. H. Towers, a Notary Public, in and for said county and state, do hereby certify that the foregoing deposition of James C. Ernst, was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving his deposition; that said deposition was, by agreement of counsel, written by me in shorthand notes, in the presence of the witness, and said shorthand notes transcribed by me upon a typewriter. I certify that the foregoing is a true and correct and complete transcript of said shorthand notes so written by me.

I further certify that during the taking of said deposition, the plaintiff was represented by its attorney, Mr. A. C. Cassatt, and the defendant by its attorney, Mr. John E. Shepard, City Solicitor.

Given under my hand and seal of office, this 29th day of June, 1911.

[SEAL.]

(Signed)

THOS. H. TOWERS,

Notary Public, Kenton County, Ky.

161 Kenton Circuit Court, Common Law & Equity Division.
12434.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff,
vs.
CITY OF COVINGTON et al., Defendants.

Deposition for Plaintiff.

The deposition of Wm. H. Harton, taken by agreement on Wednesday, June 14, 1911, at the office of the plaintiff company, S. E. cor. Third St. & Court Avenue, Covington, Ky., to be read as evidence on behalf of the plaintiff in the above styled cause.

It was stipulated between counsel that the deposition may be taken in shorthand by a stenographer, and the transcript may be used as evidence in the above styled cause, subject to exception by either party as to relevancy and competency, and the signature of witness to the deposition is waived.

Present:

A. C. Cassatt, Esq., for Plaintiff.

John E. Shepard, Esq., City Solicitor for Defendants.

162 The witness, W. H. HARTON, of lawful age, being first duly sworn, deposes as follows:

Direct examination.

Mr. CASSATT:

Q. 1. State your name?

A. W. H. Harton.

Q. 2. Where do you reside?

A. Newport, Ky.

Q. 3. What is your occupation?

A. Civil engineer.

Q. 4. What position do you occupy with the plaintiff, The South Covington & Cincinnati Street Railway Co.?

A. Superintendent of tracks.

Q. 5. How long have you been in the employ of the company?

A. Nineteen years.

Q. 6. What positions have you held?

A. I have been engineer of maintenance of way, purchasing agent, rodman, engineering corps.

Q. 7. And the position which you now occupy?

A. Yes sir, position I hold.

Q. 8. How many styles of cars are operated by the South Covington & Cincinnati Street Railway Co., or were operated, rather, in November, 1910?

A. Four.

Q. 9. What do you call them?

A. We have open summer car, box car, semi-convertible, and convertible cars.

Q. 10. Have you made a diagram of each of those cars, showing its dimensions, and dimensions of the front platform, space, &c.?

A. Yes sir.

Q. 11. I will ask you to put it in evidence, and attach it as Exhibit "A" to this deposition?

A. I do so, and mark it Exhibit "A", and make it part of my deposition.

Q. 12. I see upon this diagram statements purporting to be seating capacity of the several styles of cars?

A. Yes sir.

Q. 13. State whether that is a correct statement of their seating capacity?

A. It is.

Q. 14. There are certain marks and lines on there indicating dimensions,—certain figures on these several diagrams, on the plat Exhibit "A"; I will ask you to state whether or not those represent correct dimensions in feet and inches?

A. Yes sir.

Q. 15. At the points indicated?

A. They do.

Q. 16. Please state what you figure the standing capacity in the interior of each of the cars, taking them separately?

A. You mean square feet?

Q. 17. Capacity for accom-odating passengers standing?

(Objected to by Defendants.)

A. In the semi-convertible, we have outside of the seats—

Q. 18. Answer the question as to the number of people
164 it will accom-odate?

A. In the semi-convertible car it will accom-odate twenty-one people standing inside the car body.

Q. 19. In the convertible car?

A. It will accom-odate twenty-one.

Q. 20. Summer cars?

A. Fifteen.

Q. 21. Box cars?

A. Twenty-two. That figures two square feet to the person,—that's the average.

Q. 22. Have you made a diagram of the front platform of the various styles of cars shown on Exhibit "A"?

A. I have.

Q. 23. Will you please file that here, and put each one in evidence separately, and state the space left by the railing, as such railing appears on each of said plats?

A. The summer car; from the railing, so that the motorman will

be entirely away from the passengers, it would leave one foot, and half an inch from the railing to the doorway.

Q. 24. You have before you plat of the front platform of the summer cars?

A. Yes sir.

Q. 25. Does that contain figures showing dimensions as indicated?

A. Yes sir.

Q. 26. Are those figures correct?

A. Yes sir.

Q. 27. Please attach to your deposition and mark it Exhibit "B"?

165 A. I do so.

Q. 28. Produce the plat of the next style of car which you have before you?

A. Box car. That you will mark Exhibit "C".

Q. 29. That plat contains figures purporting to show dimensions at the points indicated; are those figures correct?

A. They are.

Q. 30. State what space is left after placing railing on the front platform, as marked on that plat?

A. One foot and four inches.

Q. 31. What's next?

A. Convertible car.

Q. 32. Please place that in evidence and attach to your deposition, marked Exhibit "D"?

A. I do so.

Q. 33. That plat contains figures which purport to show the dimensions at the points indicated; are those figures correct?

A. They are.

Q. 34. What space is left by the railing on the front platform, in the case of that style of car?

A. Ten and one-half inches.

Q. 35. From the railing to the door?

A. Yes sir.

Q. 36. What's the next?

A. Semi-convertible car.

Q. 37. Have you plat of that front platform?

A. Yes sir.

Q. 38. Please attach it and mark it Exhibit "E"?

A. I do so.

166 Q. 39. What space is left there between the railing and doorway?

A. Eight and one quarter inches.

Q. 40. That plat contains figures which purport to indicate dimensions at the place mentioned?

A. Yes sir.

Q. 41. Are those figures correct?

A. They are.

Q. 42. Generally speaking, referring to those plats, they contain certain words indicating brakes, steps, center of door, controller,

&c.: do the objects indicated occur on those platforms as indicated on the plats?

A. Yes sir.

Q. 43. Will you please furnish the number of each of these styles of cars in use on the Covington lines, in and about November, 1910?

A. Yes sir, I will do so.

Q. 44. I asked you to make a plat of the portion of the City of Cincinnati traversed by the lines of the South Covington & Cincinnati and C. N. & C. Railway Co.: has that plat been finished?

A. Not quite.

(By consent the plat may be finished and attached to the deposition of the witness when it is finished.)

(It is also agreed that witness will furnish plat showing the lines of the South Covington & Cincinnati St. Ry. Co. in the City of Covington.)

Q. 45. Referring to the territory traversed by the South Covington and tracks used by this company in the City of Cincinnati, can you state what the grade of that territory is, taking it from 167 the bridge up to Fifth street?

A. Starting it at the end of the Suspension Bridge at Second Street, the grade is slight until you reach Pearl street; then between Pearl and Fourth very steep grade, averaging about seven and one half percent to the hundred feet.

Q. 46. Where is the steepest part of the grade which you have just described? From Pearl to Third, or from Third to Fourth?

A. From Pearl to Third.

Q. 47. What is the grade from Third to Fourth?

A. Seven percent.

Q. 48. What portion of the City of Cincinnati if any, in the vicinity of your tracks, is known as the "bottoms"?

A. Around Second and Pearl streets, practically from the L. & N. Bridge to the Southern bridge.

Q. 49. What is the character of that territory, as to its occupancy?

A. Occupied by various industries where it requires a considerable amount of hauling, also transfer point between different railroads.

Q. 50. Are you able to state, as an official or employé of this company, whether an appreciable portion of the Covington business is concerned with people who work in the "bottoms" or whose destination is the "bottoms"?

A. Yes sir, considerable.

Q. 51. Where does the bulk of the travel between Covington and Cincinnati go,—where in Cincinnati?

A. Goes to Fourth & Walnut, Fifth & Walnut, Fifth & Vine.

168 Q. 52. Is there any place in Cincinnati which is known and used as a street car center, for the purpose of transferring to the Cincinnati lines, and between the Cincinnati lines?

A. Yes sir, Fountain Square or Government Square is considered to be a central transfer point for people going to any part of the city.

Q. 53. What street is that?

A. That's Fifth Street.

Q. 54. Between what streets?

A. Between Vine and Main.

Q. 55. All car lines converge at that point?

A. Majority of them.

Q. 56. Are any of the retail stores or places of amusement or offices in the City of Cincinnati south of Fourth street, generally speaking?

A. No sir, practically none.

Cross-examination.

Mr. SHEPARD:

Q. 1. Mr. Harton, what is your basis for computing the standing room in these cars?

A. Two square feet to the person.

Q. 2. You mean to say it is a foot deep and two feet wide?

A. Yes sir.

Q. 3. And in figuring the amount of standing room in these respective types of cars, how did you compute the space available?

A. You have the length of the car body inside, and you
169 have the width between seats, that gives you the square
feetage.

Q. 4. Referring now to the semi-convertible type you compute the entire space between the ends of the seat?

A. Outermost part of the seats.

Q. 5. What is the length of those seats?

A. They run about twenty-eight inches.

Q. 6. They are designed to accomodate two people?

A. They are designed to accomodate two people.

Q. 7. Isn't it a fact that it is necessary for a person sitting on the outside end, or end of these seats near the aisle, to project into the aisle some?

A. That depends on the person, a great many of them won't project in the aisle at all; get two very large people there it will. I am trying to strike an average of space.

Q. 8. How long are the seats in these cars?

A. They are about twenty-four inches.

Q. 9. That would be allowing only one foot to each person on a seat?

A. About fifteen inches this way in depth.

Q. 10. I refer to the length of the seat, which you say is twenty-four inches, the space on each side allotted to each person would be one foot, would it not?

A. I want to correct that statement in regard to the other; actual length of the seat is two feet, seven inches.

Q. 11. That would be thirty-one inches?

A. Yes sir.

Q. 12. That would be allowing fifteen and a half inches
170 to each person for a seat?

A. Yes sir.

Q. 13. State whether it is a fact, if you know from your own observation, that two persons of ordinary size, sitting upon these seats occupy all the space and it is necessary for the one sitting nearer the aisle, to project into the aisle?

A. Some cases yes, some case- no.

Q. 14. Persons of ordinary size?

A. No sir, space will just about accomodate two people, unless they are extra large.

Q. 15. Don't the arms and hands of the persons sitting on these seats, project near to the aisle,—project into the aisle?

A. Arms project into the aisle, yes sir.

Q. 16. So that all that space is not available for persons who may stand there?

A. Still you have to take into consideration the space between seats.

Q. 17. The arms are not projecting, which you haven't taken in consideration in the square feet. This space between seats you have referred to, is occupied by the limbs of the persons who are seated?

A. Yes sir.

Q. 18. Referring to the box car type, your plat indicates ten inches allowed as clearance; is that the amount which you compute is necessary for the accomodation of the feet and knees of the persons who are seated on the seats?

A. Yes sir.

171 Q. 19. What is the width of those seats?

A. We allow ten inches in there.

Q. 20. What is the width of the seats?

A. Eighteen inches.

Q. 21. What is the length of the seats on the convertible cars that you refer to?

A. Two feet, seven inches.

Q. 22. And I suppose seats in the summer cars are about the same length?

A. Same length.

Q. 23. In computing standing space in each of these cars, you have deducted space occupied by the seats, and in the case of the side-seated cars deduct the space and ten inches clearance in the aisle and computing all the remaining available space?

A. Yes sir.

Q. 24. You have made no allowance whatever for the passage way in the crowd, or for persons coming in or out?

A. No sir.

Q. 25. Now, then, referring to the plats filed, showing arrangements suggested by you to meet the requirements of the ordinance with reference to railings on the front platforms of the cars, and particularly to the plat, Exhibit "B," state how much space you have estimated would be required by the motorman, and the amount of space that is left within the railing suggested by you on that plat?

A. Space one foot wide.

Q. 26. How deep?

A. That's what I intended for depth,—I meant distance between controller and railing would be just a foot?

Q. 27. How wide?

A. Just two feet wide.

Q. 28. What space would be left for the accommodation of passengers on that platform, after the construction of the railing in the manner you suggest?

A. There would be a triangular space between the railing and part of the platform to the left of the controller.

Q. 29. Compute the area, and see how many it would accommodate, adopting the same basis you did for the interior of the car.

A. Six square feet.

Q. 30. That would accommodate three persons?

A. Yes sir.

Q. 31. Referring to the plat, Exhibit "C," compute the amount of space available there for passengers, after the construction of the railing in the position you suggest?

A. That would be six feet too.

Q. 32. That would accommodate three persons?

A. Yes sir.

Q. 33. Plat Exhibit "D"?

A. Five square feet under that,—accommodate two persons,—practically two people.

Q. 34. Referring now to Exhibit "E," which shows platform for the convertible cars, and the notation is made on the plat that this is cars No. 239 and 253, inclusive?

A. Yes sir.

Q. 35. Does that indicate number of cars of that type, that is owned by the company?

A. Yes sir, that one particular type.

173 Q. 36. How many of those are in operation in the City of Covington?

A. I couldn't give you that,—I will get you that.

Q. 37. That plat indicates the position of the controller; isn't it a fact that the controller is located some distance from the edge of the platform, in from the edge of the platform?

A. Yes sir, that's the way it shows here.

Q. 38. Wouldn't it be possible to adjust that controller to the edge of the platform, with very little trouble or expense?

A. We are as near the platform,—near the dash,—as we can reasonably do so now, due to the fact the wires and other electrical apparatus which is necessary to attach to the controller.

Q. 39. Aren't the controllers on the other type of car very much closer to the dash than that?

A. No sir.

Q. 40. Wouldn't it be practicable to do it?

A. No sir.

Q. 41. You say the space available then between the railing located as you suggest and door, would be eight and one quarter inches?

A. Yes sir.

Q. 42. Are there guard rails on this platform at the present time?

A. There is part of a guard rail, yes sir.

Q. 43. How far does it extend, and what is the space left between it and the door?

A. Space between the door and end of the present guard
174 rail is twelve inches.

Q. 44. When were these present guard rail- installed by the company?

A. On *on* the front platform?

Q. 45. Yes?

A. They were put in about four years ago.

Q. 46. They were installed by the company for the protection of the motorman and to prevent interference with the operation of the car?

A. Done to keep passengers from getting too close to the controller.

Q. 47. And preventing the motorman from operating the controller?

A. Yes sir.

Mr. CASSATT: The present guard rails do not extend behind the motorman, do they?

A. No sir.

Mr. CASSATT: They are built on one side?

A. Yes sir, on one side controller is on.

Mr. CASSATT: They are indicated on those plats?

A. Each and every one, yes sir.

Mr. CASSATT: In their present form?

A. Yes sir, and also proposed form as shown.

Mr. SHEPARD:

Q. 48. What is the space available on these platforms, Exhibit "E," after the installation of the guard rail in the position suggested by you on this plat?

A. Four square feet.

Q. 49. Will you please give me the mileage of the respective lines operated by the company over the Suspension Bridge and in Cincinnati?

175 A. I will. (To be supplied.)

Q. 50. Through the City of Covington and over the Suspension Bridge?

A. Yes sir.

Redirect examination.

Mr. CASSATT:

Q. 1. I forgot to ask you, the space which you have allowed in your diagrams of the various front platforms for the motorman: was this space computed with reference to compliance with the ordinance involved in this case?

A. Yes sir.

Q. 2. Is it the same in case of each of the platforms?

A. Yes sir.

Q. 3. Viz, one foot by two?

A. Yes sir.

Q. 4. Take the box cars: space in the box cars, consisting of long seat on each side of the car, longitudinal side seats,—are there any arms or other divisions on those seats?

A. No sir.

Q. 5. To indicate the number of people?

A. No sir.

Q. 6. What is the average number which can be accommodated in a box car of the kind you have put in evidence?

A. We found about twenty-three of them can be accom-odated on the two seats.

Q. 7. In computing the number of people who can be accom-odated standing in the cars, how far, if at all, have you relied upon your observation as an employé and official of the street railway company?

176 A. Tried to make a study to a certain extent, and have taken measurements at different times, near as I could get to it, without being very accurate in that regard, and found that it averaged just as I computed it.

The further taking of these depositions is adjourned until Tuesday, June 27, 1911, at 9:30 o'clock A. M.

(Signed)

THOS. H. TOWERS,
N. P., Kenton Co., Ky.

TUESDAY, June 27, 1911.

Pursuant to foregoing adjournment, the taking of these depositions is resumed.

And also, the witness W. H. HARTON, recalled, and deposes as follows:

Direct examination.

Mr. CASSATT:

Q. 1. Do you desire to make any correction in your former deposition, as to the plats?

A. I do.

Q. 2. State which exhibit you refer to, and what change you want to make?

A. I stated that Exhibit "E" was the platform of the semi-convertible car. That is a mistake: it was merely another type of platform on the convertible cars. I now offer a plat of the platform of a semi-convertible car, which I attach, and mark it Exhibit "F."

Q. 3. Have you a plat of the route followed by your lines in the City of Cincinnati, from the Suspension Bridge around Fountain Square?

177 A. I have.

Q. 4. Please attach it, and mark it Exhibit "G?"

A. I do so.

Q. 5. Have you prepared a plat showing the various lines of your company in the City of Covington and vicinity?

A. I have.

Q. 6. Please attach it, and mark it Exhibit "H?"

A. I do so.

Q. 7. These last three plats which you have put in evidence, contain certain lines and names of streets and other objects; I will ask you to state whether such words and lines upon those plats correctly state what they purpose to state?

A. They do.

(It is agreed between counsel that the plats which are made part of Mr. Harton's deposition, may be filed separately from the deposition, and have the same force and effect as if attached.

Q. 8. On the Cincinnati plat there are certain red lines and black lines in the various streets; what do they indicate?

A. Black lines indicate the tracks over which the South Covington & Cincinnati Street Railway Co. operate; the red lines indicate tracks over which the Cincinnati Street Railway Co. operate.

Q. 9. What do the red lines on the Covington plats show?

A. They show tracks operated by the South Covington & Cincinnati Street Railway Co.

178 Cross-examination.

Mr. SHEPARD:

Q. 1. Exhibit "F," which you filed, shows front platform, you say, of another type or additional type of the semi-convertible cars?

A. That's a semi-convertible car; the other was an error.

Q. 2. Have you computed the area apportioned by this drawing to the accommodation of passengers,—can you say how many it will accommodate, on the basis adopted by you in your deposition for the accommodation of passengers standing?

A. The area is twelve square feet,—accommodate about six people.

Q. 3. You testify with reference to this Exhibit "G"?

A. Yes sir.

Q. 4. Exhibit "G" shows distance from low water mark to the south line of Fourth street to be 2265 feet, I believe, is that correct?

A. Yes sir, that's correct.

Q. 5. What is the additional distance to Fifth Street,—north side of Fifth Street?

A. 400 feet.

Q. 6. Making total from the low water mark to the north loop of the C. N. & C. Railway Co. on Fifth street, 2665 feet?

A. Yes sir.

Q. 7. Referring to Exhibit "H," there are five bridges shown across the Ohio river, two of which are from Covington and two of which are from Newport; the plaintiff company operates cars over the Suspension Bridge alone, out of Covington, does it not?

A. Yes sir.

Q. 8. And operates cars over both the Broadway and Newport Bridge, and the L. & N. Bridge, out of Newport.

A. Yes sir.

Q. 9. The lines of plaintiff company in Newport and vicinity east of the Licking River, are not shown on this plat?

A. No sir.

Q. 10. You have been asked to furnish a schedule of the car mileage on all routes operated by the plaintiff company in the City of Covington and through the City of Covington: will you please file that with your deposition, and mark it Exhibit - F?

A. I do so.

Redirect examination.

Mr. Cassatt:

Q. 1. You have been asked to furnish a statement of the number of cars of each class operated by the company in the City of Covington in November, 1910: will you please furnish that information?

A. I will. Box cars, twenty-seven; convertible cars, eighteen; semi-convertible cars, twenty; making a total of sixty-five cars.

Q. 2. During the summer what other cars are operated in the City of Covington, outside of those mentioned?

A. We operate open summer cars.

Q. 3. How many?

A. During the year 1910 we operated twenty.

180 Q. 4. Is there any other bridge than the Suspension Bridge, between Covington and Cincinnati, which is so constructed as to permit the passage of street cars, or upon which your company has any right to operate street cars?

A. No sir.

181 STATE OF KENTUCKY.

Kenton County, ss:

I, Thos. H. Towers, a Notary Public in and for said county and state, do hereby certify that the foregoing deposition of Wm. H. Harton, was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving his deposition; that said deposition was, by agreement of counsel, written by me in shorthand notes, in the presence of the witness, and said shorthand notes transcribed by me upon a typewriter. I certify that the foregoing is a true and correct and complete transcript of said shorthand notes so written by me.

I further certify that during the taking of said deposition, the plaintiff was represented by its attorney, Mr. A. C. Cassatt, and the defendant by its attorney, Mr. John E. Shepard, City Solicitor.

Given under my hand and seal of office, this 30th day of June, 1911.

[SEAL.]

(Signed)

THOS. H. TOWERS,

Notary Public, Kenton County, Ky.

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Ex. 1.

Round Trip Mileage Through City of Covington, Kentucky.

	Cincinnati.	Covington.	County out- side of city Covington.	Total
From Mitchell	1,757	3,602	7,508	12,867
Salmon	1,757	4,438	-----	6,195
Madison Ave.	1,757	3,476	-----	5,233
Shooney	1,757	3,489	-----	5,246
Latham (Pike & Madison) Rose- inch	1,757	8,502	-----	10,259
Larkin	1,757	2,630	4,882	9,269
Main St.	1,757	2,216	-----	3,973
Kentuckburg	1,757	3,972	-----	5,729
Newport & Covington	1,634	1,34	2,188	5,162
Covington & Newport	1,748	1,330	2,189	5,267

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Kenton Circuit Court, Common Law & Equity Division.

12434.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff,

vs.

CITY OF COVINGTON, &c., Defendants.

Depositions for Plaintiff.

The deposition of THOMAS J. GREEN, taken on recall, by agreement of counsel, on Tuesday, the 27th, day of June, 1911, at the office of the plaintiff company, Third St. & Court Avenue, Covington, Ky., to be read as evidence on behalf of the plaintiff in the above styled cause.

By agreement of counsel, the deposition is taken in shorthand, by a stenographer, and signature of witness to the deposition is waived.

The witness, THOMAS J. GREEN, of lawful age, being first duly sworn, deposes as follows:

Recalled for further cross examination by Mr. Shepard, attorney for defendants.

Cross-examination.

Q 1. Mr. Green, you have testified in your deposition heretofore given, that the average load between 5-15 and 6-15, on the cars operated into Covington from Cincinnati, was between sixty-five and seventy—I believe?

A. Yes sir.

184 Q. 2. What is the maximum load carried upon these cars?
A. That means heaviest?

Q. 3. Yes.

A. I have known them to have as many as a hundred, on a car at one time.

Q. 4. Does this occur frequently?

A. No sir.

Q. 5. To what extent and in what number are the passengers carried, as a daily occurrence, maximum number, I mean?

A. I will say eighty-five people maximum number, is of daily occurrence.

Q. 6. And in rare instances as many as a hundred?

A. Yes sir, that very rare instance.

Q. 7. Taking the convertible type of car, and the semi-convertible type, and also summer cars, being those types which have seats on either side of the center aisle and at right angles to the aisle, when two persons are placed upon each of these seats to what extent does the outside person or the one next to the aisle, project into the aisle? I refer to people of ordinary size, under ordinary circumstances?

A. Ordinary size people just about fill seat full, if they are the same size people, outside one sometimes extends somewhat into the aisle, large people.

Q. 8. The arms and shoulders of the persons near to the aisle, in every instance, however, projects into the aisle, does it not?

A. I should say not every instance; it depends on the size of the people.

185 Q. 9. As a rule, unless they are very small people, isn't it a fact that the arm and shoulder of the person sitting next to the aisle, projects into the aisle?

A. Ordinary people, arm will not extend into the aisle, if they are sitting in proper position. Of course they can fold their elbows so as to stick out into the aisle.

Redirect examination.

Mr. CASSATT:

Q. 1. Mr. Green, are there any cemeteries on the Fort Mitchell line?

A. Yes sir, there are three cemeteries on the Fort Mitchell line.

Q. 2. To what extent are those cemeteries visited or utilized by Covington people?

A. Covington people bury their dead in those cemeteries.

Q. 3. At the funerals which occur in those cemeteries, is your Fort Mitchell line used by people coming and going?

A. Yes sir.

Q. 4. How frequently do funerals occur at those cemeteries?

A. Mostly every day there is a funeral at a cemetery, sometimes at all three of the cemeteries on the same day.

Q. 5. Is it every possible for your company to foretell demands which will be made from day to day upon the Fort Mitchell line for these funerals?

A. No sir.

Q. 6. Is the variation from day to day great or small?

A. Travel on the Fort Mitchell line varies considerable.

186 Q. 7. Is the variation from day to day on account of these funerals, great or small?

A. It is great.

Q. 8. What lines use Madison Avenue crossing the C. & O. Railroad at a grade crossing?

A. Madison Avenue and Greenup and Rosedale.

Q. 9. Are those lines extensively patronized, or are they small lines?

A. They are very extensively patronized.

Q. 10. A blockade at 17th & Madison, would block cars going both ways, would it not?

A. Yes sir.

Q. 11. And on all three of those lines?

A. Yes sir.

Q. 12. What about the grade crossing with the L. & M. on Pike Street, in Covington,—what lines cross the L. & N. and C. & O. at that point?

A. Main street and Fort Mitchell lines.

Q. 13. Do those lines have great or small traffic?

A. They have great traffic.

Q. 14. How about grade crossings in that portion of Covington known as Latonia?

A. There is two grade crossings there on the Rosedale line.

Q. 15. How many railroad tracks have to be crossed?

A. There are four tracks at one crossing, and one at the other,—main line of the L. & N.

Q. 16. Is the Rosedale line which crosses these tracks a largely patronized line, or a small line?

A. It is largely patronized.

187 Q. 17. What have you to say about the comparative demands made upon your company on the holidays mentioned in the ordinance, and other days?

A. We have numbers of Saturdays and Sundays we have more travel than that on Decoration Day, Labor Day and 4th of July.

Q. 18. On these Saturdays and Sundays how is travel as to regularity,—can you tell where it is going, or when?

A. Travel varies Saturdays and Sundays, also varies on the lines they travel on.

Q. 19. How about hours at which they go?

A. That varies considerably also.

Q. 20. Have you ever observed the crowds at the Latonia Race Track taking your cars to return from the track in the evening after the races?

A. Yes sir.

Q. 21. Tell whether from your observation at those times, it is practicable for the conductor to limit the number of passengers on each car in accordance with the terms of this ordinance?

A. No, sir, it is not practicable for the conductor to limit them.

Q. 22. Why not?

A. On account they come out in such a rush, and rush on the car, it would be almost impossible to stop them.

Q. 23. How about the ability of the conductor to tell which of the passengers are expecting to ride on the platforms, and which of them expect to ride on the inside of the car,—can he tell that?

A. No sir, he couldn't tell that, for it takes some passengers some time to get in the car and get seated, they drag along, sometimes stop on the platform, and then walk in after the car is started.

Q. 24. What has been your observation as to the effect on your travel at any time in the day, specially at rush hours in the morning, of a sudden shower or snow storm?

A. Sudden shower in the morning causes all the people that usually walk, to want to take the cars.

Q. 25. Do they take the cars?

A. Yes sir.

Q. 26. Is there any considerable number of the people of Covington who ordinarily walk to their places of business in Cincinnati in the morning?

A. Yes sir.

Q. 27. What territory in the City of Covington contains those people?

A. I should say they walk from all parts of the town. There is a number of them that walk over the Suspension Bridge, also over the C. & O. Bridge, and if it is a rainy morning or bad morning, those people will crowd into the cars. West End people who patronize the C. & O. Bridge, would want to take Main Street and Ludlow cars; people from the central part of the City that walked over the Suspension Bridge, would ride on the other cars running down Madison and Greenup.

Q. 28. Where is the C. & O. Bridge located with reference to the Suspension Bridge?

A. Locates foot of Main Street.

Q. 29. What direction is that from the Suspension Bridge?

A. Six blocks west.

Q. 30. Crosses the Ohio River to Cincinnati?

A. Yes sir.

189 Q. 31. Could you give an estimate, roughly, I mean, of the number of people who in good weather, or in the absence of rain, ordinarily cross those bridges to Cincinnati in the morning?

A. It would be only a matter of guess with me.

Q. 32. Would you be able to state positively whether it is as many as two or three thousand?

A. Yes sir, be as many as two or three thousand people.

Q. 33. Does their desire to take the cars, and their act in taking the car, as you have stated, instead of walking, depend on the general state of the weather, or sudden showers or sudden snow storms?

A. Be on sudden showers or snow storms.

Q. 34. Is there any way for your company to furnish cars in sufficient number to accommodate those people in accordance with the terms of this ordinance?

A. No sir.

Q. 35. Can you give the head-way of the cars on the various lines, in the morning and evening?

A. Yes sir.

Q. 36. Will you give it to the stenographer?

A. Take the Austinburg, A. M. first, 15 minutes apart.

Q. 37. Is that morning and evening?

A. That's just in the morning.

Q. 38. Let me ask you to explain about the Austinburg line, over what part of that line is service furnished by other lines?

A. Greenup street, from Park Place to Twentieth street. The Austinburg line virtually runs from Fifteenth & Greenup around the loop in Austinburg and intersects the Greenup street line again at Twentieth & Greenup. Austinburg in P. M.—we have two extras in there in P. M., that fits in between those lines, making it 7½ minute schedule.

Q. 39. Take the next line?

A. Holman street, is 10 minutes A. M. and is 6 minutes P. M. Rosedale, 7½ minutes A. M., and 7 minutes P. M. Madison, down Greenup, 7 minutes A. M., up Madison, P. M. is 7 minutes. Greenup Street line, up Greenup, A. M., and down Madison, 7 minutes; up Greenup, P. M. 5 minutes. Fort Mitchell and Lewisburg together, A. M. 10 minutes; P. M. 8 minutes. Main street, 6 minutes A. M., 5 minutes P. M.

Q. 40. Can you give Covington and Newport?

A. Yes sir, 11 minutes A. M. and P. M. Ludlow, 8 minutes A. M.; 6 minutes P. M.

Q. 41. These schedules you have given relate to the morning rush hours and evening rush hours respectively?

A. Yes sir.

Q. 42. Is there large travel between Covington and Newport?

A. Yes sir, there is large travel between Covington and Newport.

Q. 43. Does that vary from day to day?

A. Yes sir.

Q. 44. Is it not a fact that the travel from Covington to Newport, and from Newport to Covington, may be by people who live in different parts of Covington or on different Covington lines?

A. Yes sir.

Q. 45. Is it ever possible for your company to tell in advance, how much travel there will be to and from Newport and over what lines, in any given day?

A. No sir, not practicable.

Q. 46. Does it vary from day to day?

A. Yes sir.

Q. 47. To what extent?

A. It will vary in the hundreds of people.

Q. 48. Can you tell how many of your cars that you use in summer, have any windows at all?

A. Yes sir, I can tell that.

Q. 49. Please do so?

A. You don't want me to include ones we got in Newport?

Q. 50. No, Covington cars?

A. Thirty-five cars in Covington.

Q. 51. That have windows?

A. Yes sir.

Q. 52. All the other cars that are used in Covington in the summer time have no windows,—nothing at all?

A. Not in summer time.

Q. 53. Would it be possible to fumigate during the summer those cars which have no windows at all?

A. No sir.

Q. 54. State what your company does with reference to the cleaning of its cars?

A. We scrub inside of our cars at least once a week.

Q. 55. With what?

192 A. With soap and water?

Q. 56. Thoroughly?

A. Thoroughly,—car is thoroughly cleaned.

Q. 57. What do you do from day to day with the cars?

A. We sweep and dust our cars daily. I might add to that answer, if there are any spit marks or any signs of filth in the car, the floor is scrubbed also at night time.

Q. 58. You mean every night?

A. If it is condition of the car, if it shows any signs of spit or other dirt.

Q. 59. How often is each car inspected, as to its condition as to cleanliness?

A. Each car is inspected every night.

Q. 60. Does the plaintiff company operate the street car lines in Newport in conjunction with its Covington street car lines?

A. Yes sir.

Recross-examination.

Mr. SHEPARD:

Q. 1. Referring to those cars which have not windows, they have curtains which are used as substitutes for the windows, as a matter of protection against rain, and for the purpose of enclosing the body of the car?

A. Yes sir.

Q. 2. You testified with reference to the schedules on which these cars are operated in the rush hours: at all other times during the day they are operated less frequently?

A. Yes sir.

Q. 3. What is the schedule at others than the rush hours, on the Rosedale line?

A. 15 minutes.

193 Q. 4. What is the schedule at others than the rush hours, on the Fort Mitchell line?

A. 20 minutes.

Q. 5. What is the schedule other than the rush hours, on the Main street line?

A. 8 minutes.

Q. 6. Rosedale cars are the only cars that operate on the Rosedale line and cross grade crossings in Latonia to which you refer in your testimony?

A. Only cars that operate across grade crossings in Latonia, yes sir.

Q. 7. The Main street and Lewisburg lines are the only ones that operate across the grade crossing at Pike & Russell streets?

A. Yes sir.

Q. 8. These two lines only operate in one direction across such railroad line at that point?

A. Yes sir, Fort Mitchell and Main street operate in one direction.

Q. 9. That is towards Cincinnati?

A. Yes sir.

Q. 10. You referred to the cemeteries on the Fort Mitchell line: at what distance are they located from the City of Covington?

A. 3 5/10 miles from Pike & Main streets, in the City of Covington.

Q. 11. How does the haul in the sum total, line for line, compare in Campbell County, with that in Kenton County?

A. It is almost the same.

194 Mr. CASSATT: Speaking of these cemeteries, the people who go to those cemeteries from Covington, as you have testified, go from all parts of the City of Covington, do they not?

A. Yes sir.

Q. 2. If they start on other lines than the Fort Mitchell line, at what point do they transfer to the Fort Mitchell line?

A. People from Ludlow transfer at Third & Court Avenue.

Q. 3. In Covington?

A. Yes sir; people from Main street cars will transfer at Pike & Madison; people from Holman street line will transfer at 12th & Russell; people from the south end of town will transfer at 11th & Madison.

Q. 4. You have been asked about curtains on these summer cars which have no windows; are those curtains fitted into the cars like glass, or are they loose?

A. They are loose, the air can get through them.

Q. 5. As a matter of fact you can see through them at the edges, can't you?

A. Yes sir.

Any further deponent saith not.

(Signature waived.)

STATE OF KENTUCKY,

Kenton County, ss:

I, Thos. H. Towers, a Notary Public in and for said county and state do hereby certify that the foregoing deposition of Thomas J.

195 Green, was taken before me at the time and place stated in the caption; that said witness was duly sworn before giving his deposition; that said deposition was, by agreement of

counsel, written by me in shorthand notes, in the presence of the witness, and signature of witness to the deposition waived, and shorthand notes afterwards written on a typewriter. I further certify that the foregoing is a true and correct and complete transcript of said shorthand notes so written by me. I certify that during the taking of said deposition the plaintiff was represented by its attorney, A. C. Cassatt, Esq., and the defendant by its attorney, John E. Shepard, City Solicitor.

Given under my hand and seal of office, this 28th day of June, 1911.

(Signed)

[SEAL.]

THOS. H. TOWERS,
Notary Public, Kenton County, Ky.

At a sitting of said Court on Aug. 25th, 1911:

"A motion has been made before me as Judge of the Court of Appeals to re-instate and continue, pending an appeal herein, the temporary injunction heretofore granted; the grounds being stated in the motion. Notice was served on the defendants and the same was acknowledged and the defendants appeared by counsel; a transcript of the record was submitted and the motion argued by counsel for both sides.

Upon consideration whereof I find that to deny the motion would be, in effect, to defeat the purpose of the appeal, for the plaintiff, if it is able to comply with the ordinance, would be compelled
196 to expend a large amount of money in so doing and before the validity of the ordinance is finally adjudicated, or, on the other hand, if unable to comply with the ordinance, as plaintiff claims, it might be subjected to fines amounting to several thousand dollars per day.

It is therefore ordered that the temporary injunction be re-instated and continued in force until the appeal is finally heard and disposed of on its merits, the motion and notice herein are filed herewith.

JOHN M. LASSING,
Judge Court Appeals, Kentucky.

Said motion is as follows:—

Now comes the appellant and represents that on or about the 22nd day of November 1910, it filed its petition in equity against appellees in the Kenton Circuit Court, to enjoin them from enforcing a certain ordinance of the City of Covington, on the ground that said ordinance was invalid and its enforcement would produce irreparable damage to said appellant, and upon other grounds therein stated, and such proceedings were had that on or about the 12th day of December 1910, a temporary injunction was granted in accordance with the prayer of the petition, and thereupon evidence was taken and the cause submitted; whereupon the said court, on or about the 7th day of August 1911, adjudged that said petition be dismissed and the temporary injunction dissolved, and ordered that the status existing immediately prior to the entry of said judgment be maintained and the defendants enjoined pending an application of the

plaintiff to the Court of Appeals or a Judge thereof to continue the injunction.

197 Appellant therefore moves that the temporary injunction heretofore granted by the Kenton Circuit Court herein be continued or re-instated pending an appeal herein, for the reason that unless enjoined the appellees will attempt to enforce against this appellant the ordinance set forth in the petition by the arrest of appellant's employees while in the operation of its cars and their punishment, and for the further reason that an attempt on the part of this appellant to comply with the same would result in disorder on its cars altercations with the passengers and claims or suits for damages against it, and because the enforcement of said ordinance or compliance with same would produce great and irreparable injury to the appellant in the manner set forth in the petition and amended petition.

Notice of this motion having been duly given to the appellees the acknowledgment of said notice and a transcript of the record of the Kenton Circuit Court herein are presented herewith.

ERNST, CASSATT & COTTLE,
Attorneys for Appellant.

198 Said notice is as follows:

To the City of Covington, John J. Craig, Mayor, and Henry B. Schuler, Chief of Police, by the City Solicitor:

You are hereby notified that on Monday, the 21st day of August 1911, at 9:30 A. M. we will apply, on behalf of the plaintiff in the above entitled cause, to Hon. John M. Lassing, Judge of the Court of Appeals, in Newport, Kentucky, to revise the order of the lower court in said suit and to continue, pending the appeal thereof in the Court of Appeals, the temporary injunction heretofore granted therein.

ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff.

COVINGTON, KY., August 21st, 1911.

Service of the above notice on the defendants is hereby acknowledged.

JNO. E. SHEPARD,
City Solicitor.

199 Kenton Circuit Court.

I, Wm. Macke, Clerk of said Court certify that the preceding 198 pages contain a complete and true transcript of the record in cause named in the caption.

Witness my hand as Clerk of said Court this 23rd day of November, 1911.

WM. MACKE, *Clerk,*
By A. C. ELLIS, JR., *D. C.*

200 And with the foregoing transcript there was filed a statement which is in words and figures as follows, to-wit:

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
a Corporation, Appellant,

vs.

CITY OF COVINGTON, a Municipal Corporation et al., Appellees.

Statement.

The name of the appellant herein is South Covington and Cincinnati Street Railway Company, a corporation under the laws of Kentucky.

The names of the appellees are the City of Covington, a municipal corporation of the second class under the laws of Kentucky, John J. Craig, Mayor and Henry B. Schuler, Chief of Police of said City of Covington.

The judgment appealed from was rendered on the 7th day of August, 1911 by the Common Law and Equity Division of the Kenton Circuit Court and is to be found on page forty-five of the Record.

Summons is desired for the appellant herein and shall be issued to the Sheriff of Kenton County at Covington, Kenton County, Kentucky, where the appellant's principal office and place of business is situated.

Messrs. Ernst, Cassatt and Cottle are counsel for appellant and their post-office address is First National Bank Building, Cincinnati, Ohio.

John E. Shepard, Esq., City Solicitor, Covington, Kentucky, is counsel for appellees.

201 Stephen L. Blakely, Esq., will succeed as City Solicitor for appellees January 2, 1912.

Upon the filing of the foregoing statement and transcript the Clerk of the Court of Appeals issued summons as directed by said statement against the City of Covington which was returned executed.

Be it remembered that on the 15th day of December, 1911, the following agreement was filed in this case in the Court of Appeals, to-wit:—

It is stipulated that the Clerk in making up the transcript on appeal need not copy therein exhibits A to H inclusive, referred to in the depositions of William H. Harton and therein stipulated to be filed separately, but that the originals of said exhibits heretofore filed herein separately on the 3rd day of July 1911, may be transmitted to the Court of Appeals by the Clerk with his transcript and may be treated in all respects as if copied therein.

ERNST, CASSATT & COTTLE.

Attorneys for Plaintiff.

JNO. E. SHEPARD.

City Solicitor of the City of Covington.

Attorney for Defendants.

Filed in Clerk's Office Aug. 17, 1911. Ben Macke, Clerk.

The exhibits referred to are copied and attached to this transcript.

Be it remembered that at a Court of Appeals held in and for the Commonwealth aforesaid at the Capitol at Frankfort on the 2nd day of January, 1912 the following order was entered:

SOUTH COV. & CIN. ST. RY. CO.

vs.

CITY OF COVINGTON.

Kenton.

Came the appellant by counsel and filed notice and grounds and moved the court to grant an oral argument herein, which motion is submitted.

The motion for oral argument filed by the foregoing order is in words and figures following, to-wit:

202

Kentucky Court of Appeals.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF COVINGTON, Appellee.

Appeal from Kenton Circuit Court, C. L. & Eq. Div.

Motion of Appellant for Oral Argument.

Now comes the appellant and moves the court that this cause be passed for oral argument and that an oral argument be granted, on the ground that this cause involves novel and important questions of law which have not heretofore been decided by this court.

The action is one to enjoin the enforcement of an ordinance of the City of Covington. Said ordinance provides for the regulation of street railway companies in said city.

The principal provisions of the ordinance relate to the number of passengers to be carried on cars and the number of cars to be supplied for the public service.

It is provided therein that a street railway company shall not permit more than one-third ($\frac{1}{3}$) of the seated load to stand within the cars. There is no limit placed upon the number of passengers standing on the platforms and this provision does not apply to, and cannot be enforced on the 4th of July, Decoration Day, or Labor Day. While the company is punished for permitting more than the prescribed number within the car, there is no penalty placed upon any passenger who violates this provision, even if notified or requested to comply therewith.

203 There is a further requirement that such company shall "run and operate cars in sufficient numbers at all times to

reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried."

There are other provisions in said ordinance, such as requiring certain railings on the front and rear platforms, the weekly fumigation of the cars and the maintenance of the temperature of the cars at all times above 50 degrees Fahrenheit.

Appellant claims that said ordinance is void for the following reasons.

1. Because the City Council has no power under its charter to pass the same.

2. Because said ordinance embraces more subjects than one.

3. Because said ordinance is an unreasonable and unlawful regulation of the business of the appellant.

4. Because said ordinance is in violation of a contract between appellant and said City of Covington.

5. Because said ordinance is an unreasonable regulation of interstate commerce.

6. Because said ordinance deprives appellant of its property without due process of law and denies it equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

The question involved in this case is of great importance not only to the appellant but to all of the public service corporations and municipalities in the State.

204 Wherefore appellant moves that oral argument be granted herein.

ERNST, CASSATT & COTTLE,

Attorneys for Appellant.

I have received a copy of the foregoing motion and hereby join in the request for oral argument.

JNO. E. SHEPARD,

City Solicitor of the City of Covington.

Filed Dec. 19 1911.

NAPIER ADAMS, C. C. A.

205 Be it remembered that heretofore, to-wit, at a Court of Appeals held as aforesaid on the 3rd day of January, 1912 the following order was entered:—

SOUTH COV. & CIN. ST. RY. CO.

VS.

CITY OF COVINGTON.

Kenton.

The court being sufficiently advised the motion for oral argument herein is sustained and the case is ordered to be set for argument at this term.

Be it remembered that at a Court of Appeals held as aforesaid on the 23rd day of January, 1912 the following order was entered, to-wit:—

SOUTH COV. & CIN. ST. RY. CO.

vs.

CITY OF COVINGTON.

Kenton.

This cause coming on to be heard was argued by Jno. E. Shepard for appellee and A. J. Cassatt for appellant and submitted.

On motion of the appellant printed copies of the transcript are ordered to be filed.

Be it remembered that at a Court of Appeals held in and for the Commonwealth aforesaid at the Capitol in Frankfort, Ky. on the 6th day of February, 1912 the following orders and judgment were entered, to-wit:—

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF COVINGTON, &c., Appellee.

Appeal from Kenton Circuit Court, Com. Law & Equity Division.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

It is further considered that appellees recover of appellant their cost herein expended.

206 At the same time the court delivered an opinion herein in words and figures as follows, to wit:

Court of Appeals of Kentucky.

SOUTH COVINGTON & CINCINNATI RAILROAD CO., Appellant,

vs.

CITY OF COVINGTON, Appellee.

From the Kenton Circuit Court.

Opinion of the Court by Chief Justice Hobson.

The General Council of the city of Covington passed the following ordinance, which was duly approved by the Mayor on October 24, 1910:

"An ordinance to further regulate the operation of Street Cars and Street Car lines in the city of Covington, and providing for the

health, comfort and safety of passengers using said cars and providing penalties for the violation thereof.

"Be it ordained by the General Council of the City of Covington.

"SECTION 1. That it shall be unlawful for any person, corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the city of Covington, to permit more than one third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

"SECTION 2. No such person, company or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the Police Court of said City.

"SECTION 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall ever be permitted to stand by or remain within the enclosure thus provided for the motorman.

"SECTION 4. It shall be the duty of every such person, company or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the Board of Health of the City of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

"SECTION 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"SECTION 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines within the corporate limits of the city of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the General Council of the City of Covington, may by resolution at any time direct that the number of cars

operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by Section 2 hereof.

SECTION 7. Any persons, company or corporation, violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the Police Court of the City of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such City and other exercising police power to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction, and the Chief of Police is hereby directed to assign at least one Police Officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance.

SECTION 8. Nothing contained in this ordinance shall be held or construed to be or to effect a renewal or an extension or enlargement of the right of any person, company or corporation to use or occupy the streets and highways of the City of Covington for Street Railway purposes.

SECTION 9. This ordinance shall take effect thirty days from and after its passage and approval by the Mayor."

On November 22, 1910, the South Covington and Cincinnati Street Railway Company brought this suit against the city and its authorities to enjoin the enforcement of the ordinance on several grounds. The circuit court on final hearing dismissed the action. The railway company appeals.

1. It is insisted that the city is without power to pass the ordinance. The statute regulating cities of the second class including Covington, contains among other things, this provision:

"The General Council shall have power by ordinance * * * to license, tax and regulate * * * street railway companies or corporations." (Sec. 3058 Ky. St. Subsec. 2.)

"To pass all such ordinances, not inconsistent with the provisions of this act or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade commerce and manufacturers, and to enforce the same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power." (Sec. 3058 Ky. St. Sub. 25.)

210 We have in the Kentucky Statutes a number of provisions regulating railways providing as to the maintenance of *suiting* rooms, the keeping open of ticket offices, the posting of tariffs and a number of other regulations of a similar character. That the legislature in the exercise of its police power may enact such regulations is not now seriously disputed, and we think it evident that

the General Assembly has conferred upon the municipality similar power as to street railways within the city. These are matters concerning primarily the citizens of the city, and may be better regulated by the local authorities who are cognizant of the local situation than by general laws passed by the General Assembly. The overcrowding of street cars with the troubles which naturally ensue, the providing for clean, sanitary and comfortable cars and the requiring of a reasonably efficient service are matters that the city may properly regulate under the police power.

2. It is insisted that the subject is covered by contract and may not be controlled by the municipality. In October, 1892, an ordinance was passed by the city of Covington which provided a number of things that the Street Car Company were to do. Among other things it was provided by ordinance that the Street Car Company should charge a five cent fare, and that it should run its cars during certain hours at intervals not to exceed seven minutes. This ordinance was accepted and agreed to by the Railway Company, but it is manifest from the ordinance as a whole that it was not contemplated by either of the parties that it should tie the hands of the city for all time or prevent it from requiring what was reasonable and necessary when conditions changed

211 The city of Covington has doubled in size since that ordinance was passed, conditions are entirely different, and it is perfectly evident from the ordinance that the council was only dealing with the situation then before it. It did not attempt to contract away the power of the council to deal with other and different conditions as changes might come in the future. Among other things the ordinance contains this express language:

"It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company."

The city could not contract away its governmental power, and it manifestly did not attempt to do so. (*Lexington Turnpike Co. v. Crozton*, 98 Ky. 739, *Com. v. Covington & Cinn. Bridge Co.*, 14 R. 836, *Georgia R. R. Co. v. Smith*, 128 U. S. 174, *Chicago etc. R. R. Co. v. Ill.*, 200 U. S. 561).

3. It is insisted that the ordinance interferes with interstate commerce. The railway company is a Kentucky corporation; it has no franchise or property except in Kentucky. While its cars run into Cincinnati, when they pass the State line, they are operated by an Ohio corporation. The Kentucky corporation is not engaged in interstate commerce; it simply carries the passengers to the State line. The Ohio corporation there receives them and carries them on to their destination in Cincinnati. We are utterly unable to see that there is any question of interstate commerce in the case. The ordinance is only in force in the City of Covington, and certainly the State of Kentucky may regulate a common carrier doing no business except in the State of Kentucky, and having no property except here. (*Missouri Pac. R. R. Co. v. Kansas*, 216 U. S. 261.)

212 4. Lastly it is insisted that the ordinance is unreasonable, arbitrary and impracticable. Covington and Newport are

on the South side of the Ohio river opposite Cincinnati. Newport is separated from Covington by the Licking river. The two cities have a population of something over 75,000. The Newport cars pass through Covington in going to and from Cincinnati. In addition to this there are Latonia, Ludlow, South Covington and several smaller places near by the cars from which pass through Covington. A large part of the male population in these cities work in Cincinnati. The result is that in the morning hours when the workers are going out to work, and in the evening hours when they are returning from work, there is great congestion on the cars by reason of which the passengers are subjected to dangers and are sometimes delayed in getting to and from their work, and are made more or less uncomfortable during the journey. Especially is this true of ladies on the very crowded cars. The ordinance was enacted to remedy this situation. It is insisted that the cars are capable of carrying without danger to person or health a greater number of passengers than permitted by the ordinance; that some cars have a greater capacity than others in the matter of standing passengers on the rear platform; that the ordinance limits the number of passengers permitted to stand within the cars but places no limit on the number which may be permitted to stand on the back platform, and that the company will be without power to prevent these passengers from going into the car at pleasure, as the conductor will be engaged in taking up his fares; that the ordinance provides for no fine against the passengers violating its provisions; that the company cannot prevent people from getting on the cars in

213 greater numbers than the ordinance permits; that the requirement of fumigation of each car once a week is unnecessary and unreasonable and that owing to the facilities which the Company has in Cincinnati, it will be impracticable for it to run cars at less intervals than it now runs them.

We are unable to see that the ordinance is invalid for any of these reasons. It is a reasonable requirement that the number of passengers which shall be permitted to ride within the car shall not be more than one third greater than the seating capacity of the car. When a greater number of people are permitted to be in a car, there is certainly a more or less tendency to create disorders and to bring about conditions not favorable to the health or comfort of the passengers. If the conductor is engaged in taking up his fares, some arrangement can be made to keep passengers out of the car, or an extra man may be employed for this purpose. The company has charge of its car, and it can refuse to take on other passengers, and if a passenger is allowed to get on the rear platform when there is no room in the car, he may be prevented from entering the car. If the company cannot provide the necessary accommodations for the traveling public on the cars it has, it must provide itself with more cars. It is a public servant created for a public purpose, and while it enjoys its franchise, it must discharge the duties imposed upon it by the franchise. If it cannot run its cars singly, and carry the crowd, it must run trailers or it must use larger cars. The cars it uses were adequate when the population of these cities was

half what it is now, but if larger cars are required by the increased population, then larger cars must be provided or the smaller cars must be run as trailers.

We do not see that Section- 4 or 5 are arbitrary or unreasonable. As shown by modern science a large percentage of disease is communicated by germs, and when many people are carried in cars these germs are liable to find lodgment there. We cannot say that the fumigation of a car once a week is an unreasonable requirement or that it is unreasonable to require the cars to be kept at a temperature not less than 50 Fahrenheit.

The rule at common law is that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried. This rule of the common law is to be read into Section 6 of the ordinance. It is the duty of the defendant under the ordinance to run and operate cars in sufficient numbers at all times to reasonably accommodate the public as there provided, in so far as in the exercise of ordinary care it has reason to anticipate that such an amount of accommodation will be necessary. When section 6 is thus read it is not unreasonable or arbitrary or impracticable of enforcement. The company will not be responsible for not furnishing a sufficient accommodation to accommodate a crowd which it has not reason in the exercise of ordinary care to anticipate. But it should exercise ordinary care to provide cars that will reasonably accommodate the passengers which may reasonably be anticipated.

Judgment affirmed.

Jno. E. Shepard, Stephens L. Blakely, For Appellee.
Ernst, Cassatt & Cottle, For Appellant.

215 Be it remembered that afterwards, to-wit, on the 12th day of February, 1912, the appellant, South Covington & Cincinnati Street Railway Company, filed in the office of the Clerk of the Court of Appeals of Kentucky an Assignment of Errors which is in words and figures as follows, to-wit:

Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG,
Mayor, and Henry B. Schuler, Chief of Police of said City, De-
fendants in Error (Appellees).

Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the proceedings and in the final judgment of the Court of Appeals of the State of Kentucky in the above entitled case there is manifest error in this, to-wit:

1. The court erred in holding that a certain ordinance of the defendant in error, the City of Covington, set forth in the petition herein, is not an unlawful and unreasonable interference with and regulation of interstate commerce, in conflict with and in violation of the provisions of Article 1, Section 8 of the Constitution of the United States.

216 2. The court erred in holding that said ordinance does not deprive this plaintiff in error of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in holding that the said ordinance is not an impairment of the obligation of the contract of October 7, 1892, between said City of Covington and the plaintiff in error (which said contract is in evidence herein) in violation of Article 1, Section 10 of the Constitution of the United States.

4. The court erred in holding that the provisions of said ordinance limiting the number of passengers to be carried on each of the cars of plaintiff in error was a valid exercise of the police power of the State of Kentucky and not an unreasonable regulation, or any regulation, of commerce between the States of Kentucky and Ohio.

5. The court erred in holding that the provision of said ordinance requiring plaintiff in error to run and operate cars in sufficient numbers at all times to reasonably accommodate the public, within the limits of said ordinance as to the number of passengers permitted to be carried, was a valid exercise of the police power of the State of Kentucky and not an unreasonable regulation, or any regulation, of commerce between the States of Kentucky and Ohio.

6. The court erred in holding that said last named provision of said ordinance was not an impairment of the contract between the City of Covington and this plaintiff in error dated October

217 7, 1892, (appearing in the record herein) and in violation of Article one, Section 10 of the Constitution of the United States.

7. The court erred in holding that neither of said provisions last named was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The court erred in holding that the provisions of said ordinance requiring a minimum temperature at all times in its cars, certain railings thereon, and fumigation thereof, were neither of them in violation of Article 1, Section 8 of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The court erred in entering judgment for defendants in error (appellees) and in affirming the judgment in their favor of the Kenton Circuit Court.

ERNST, CASSATT & COTTLE,
Attorneys for The South Covington & Cincinnati
Street Railway Company.

Filed Mar. 12, 1912. Rob't L. Greene, C. C. A.

218 And on said date, to-wit, February 12, 1912, there was filed in the office of the Clerk of the Court of Appeals a Petition for a Writ of Error and which is attached hereto and is as follows:—

219 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG,
Mayor, and Henry B. Schuler, Chief of Police of said City, De-
fendants in Error (Appellees).

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky:

Plaintiff in error alleges that on the 6th day of February, 1912, the Court of Appeals of the State of Kentucky entered a final order and judgment herein in favor of the defendants in error, in which final order and judgment and the proceedings at the trial thereof in this cause certain errors were committed to the prejudice of the plaintiff in error, all of which will appear more in detail from the assignment of errors which is filed with this petition.

220 That said Court of Appeals of the State of Kentucky is the highest court in said State in which a decision in said suit could be had and there was drawn in question therein the validity of a statute of, or an authority exercised under said State, on the ground that the same was repugnant to the Constitution of the United States and the decision therein was in favor of their validity.

Wherefore plaintiff in error prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of and that a transcript of the record herein, duly authenticated, may be sent to the Supreme Court of the United States.

THE SOUTH COVINGTON & CINCINNATI
ST. RY. CO.,

By ERNST, CASSATT & COTTLE *Its Attorneys.*

220½ [Endorsed:] Court of Appeals of the State of Kentucky.
The South Covington & Cincinnati Street Ry. Co., Plaintiff,
in Error (Appellant), vs. The City of Covington, a Municipal Corporation; John J. Craig, Mayor, and Henry B. Schuler, Chief of Police of said City, Defendants in Error (Appellees). Petition for writ of error from the Supreme Court of the United States. Ernst, Cassatt & Cottle, Attorneys for So. Cov. & Cin. St. Ry. Co. Filed Mar. 12, 1912. Rob't L. Greene, C. C. A.

221 And on said date, to-wit, February 12, 1912 there was filed in the office of the Clerk of the Court of Appeals a Writ of

Error from the Supreme Court of the United States and the order allowing same, by the Chief Justice of the Kentucky Court of Appeals, and which are attached hereto as follows, to-wit:—

222 THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error,

vs.

THE CITY OF COVINGTON, a Municipal Corporation; John J. Craig, Mayor, and Henry B. Schuler, Chief of Police of said City, Defendants in Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The South Covington & Cincinnati Street Railway Company, a corporation under the laws of Kentucky, and the City of Covington, a municipal corporation under the laws of Kentucky, John J. Craig its Mayor and Henry B. Schuler its Chief of Police, wherein was drawn in question the validity of a treaty or Statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn

223 in question the validity of a statute of, or an authority exercised under, said state; on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The South Covington & Cincinnati Street Railway Co., as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of April, 1912, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward Douglas White, Chief Justice of the said Supreme Court, the 12th day of March in the year of our Lord One Thousand Nine Hundred and twelve.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk U. S. District Court,
Eastern District of Kentucky,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by

J. P. HOBSON,

Chief Justice Kentucky Court of Appeals.

223½ [Endorsed:] The South Covington & Cincinnati Street Ry. Co., Plaintiff in Error vs. The City of Covington, a Municipal Corporation, John J. Craig, Mayor, and Henry B. Schuler, Chief of Police of Said City, Defendants in Error. Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky. Filed Mar. 12, 1912. Rob't L. Greene. C. C. A.

224 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),
vs.

THE CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG, Mayor, and Henry B. Schuler, Chief of Police of said City, Defendants in Error (Appellees).

Allowance of Writ of Error.

This cause coming on to be heard on the petition of the plaintiff in error (appellant) for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said petition and the record in said matter and desiring to give the petitioner opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and it is hereby allowed to this court from the Supreme Court of the United States and that pending the decision of said court the temporary injunction against the defendants shall be continued in force and that the bond presented by the petitioner in the sum of five thousand (\$5,000) dollars with Title Guaranty & Loan Company as surety be and the same is hereby approved.

J. P. HOBSON,
Chief Justice.

224½ [Endorsed:] Court of Appeals of the State of Kentucky.
The South Covington & Cincinnati Street Ry. Co., Plaintiff
in Error (Appellant) vs. The City of Covington, a Municipal Corporation, John J. Craig, Mayor, and Henry B. Schuler, Chief of Police of Said City, Defendants in Error (Appellees). Allowance of Writ of Error. Filed Mar. 12, 1912. Rob't L. Greene, C. C. A.

225 And on said date, to-wit, February 12, 1912, there was filed in the office of the Clerk of the Court of Appeals a Writ of Error Bond, and which is in words and figures as follows, to-wit:—

Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE CITY OF COVINGTON, a Municipal Corporation: JOHN J. CRAIG, Mayor, and Henry B. Schuler, Chief of Police of said City, Defendants in Error (Appellees).

Bond.

Know all men by these presents, That we, The South Covington and Cincinnati Street Railway Co. as principal, and Title Guaranty & Surety Company as surety, are held and firmly bound unto The City of Covington, John J. Craig and Henry B. Schuler, in the sum of five thousand (\$5,000) dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of March, 1912.

Whereas the plaintiff in error hath prayed a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

226 Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE SOUTH COVINGTON & CINCINNATI
ST. RY. CO.,

By JAS. C. ERNST, *President*.

THE TITLE GUARANTY & SURETY CO.,

Per D. D. SMITH, *Att'y-in-fact*.

I hereby approve the foregoing bond and sureties this 12 day of March, 1912.

J. P. HOBSON,

*Chief Justice of the Court of Appeals
of the State of Kentucky.*

Filed Mar. 12, 1912.

ROBT L. GREENE, C. C. A.

227 And afterwards, to-wit, on the 21st day of March, 1912 there was filed in the Clerk's office of the Court of Appeals, the original citation with acceptance of service thereon, and which is hereto attached as follows:—

228 Court of Appeals of the State of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error (Appellant),

vs.

THE CITY OF COVINGTON, a Municipal Corporation; JOHN J. CRAIG,
Mayor, and Henry B. Schuler, Chief of Police of said City,
Defendants in Error (Appellees).

Citation.

UNITED STATES OF AMERICA, ss:

To the City of Covington, John J. Craig, Mayor of said City, and
Henry B. Schuler, Chief of Police thereof, Greeting:

You are hereby cited and admonished to be and appear at a
Supreme Court of the United States, at Washington, within thirty
(30) days from the date hereof, pursuant to a writ of error filed in
the clerk's office of the Court of Appeals of the State of Kentucky,
wherein The South Covington & Cincinnati Street Railway Company
is appellant (plaintiff in error) and you are appellees (defendants in
error), to show cause, if any there be, why the judgment rendered
against appellant (plaintiff in error), as in the said writ of error men-
tioned, should not be corrected and why speedy justice should not be
done to the parties in that behalf.

229 Witness the Honorable J. P. Hobson, Chief Justice of the
Court of Appeals of Kentucky this 12 day of March, 1912.

J. P. HOBSON,
Chief Justice.

Copy of the within citation received this 15th day of March, 1912,
and service accepted.

STEPHENS L. BLAKELEY,
City Solicitor, Attorney for Appellees (Defendants in Error).

229½ Endorsed: Court of Appeals of the State of Kentucky.
The South Covington & Cincinnati Street Ry. Co. Plaintiff in
Error (Appellant) vs. The City of Covington, a Municipal Corpora-
tion, John J. Craig, Mayor and Henry B. Schuler, Chief of Police of
said City, Defendants in Error (Appellees). Citation. Filed Mar.
12 1912. Robt. L. Greene, C. C. A. 1912 March 21, filed. Att.:
Robt. L. Greene, Clk. C. A.

230 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record in the case of South Covington & Cincinnati Street Railway Company vs. The City of Covington, with all things touching the same, as appears from the records and files of my office. Copies of the maps referred to on page 201 of this transcript are attached hereto and marked exhibits "A" to "H" inclusive.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in Frankfort, Kentucky, on this the 3rd day of April, 1912.

[Seal Kentucky Court of Appeals.]

ROBT. L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript \$82.00.

Endorsed on cover: File No. 23,149. Kentucky Court of Appeals. Term No. 227. The South Covington & Cincinnati Street Railway Company, plaintiff in error, vs. City of Covington, John J. Craig, mayor, and Henry B. Schuler, chief of police. Filed April 8th. 1912. File No. 23,149.



No. **28**

U. S. SUPREME COURT
FILED
MAY 23 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, **1914**

THE SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY,

Plaintiff in Error

versus

THE CITY OF COVINGTON et al,

Defendants in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiff in Error.

RICHARD P. ERNST,
ALFRED C. CASSATT,
FRANK W. COTTLE,

Attorneys for Plaintiff in Error.



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Supreme Court of the United States.

October Term, 1912.

THE SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY,

Plaintiff in Error,

No. 227.

vs.

THE CITY OF COVINGTON *et al*,
Defendants in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiff in Error.

The Street Railway Company, operating its cars between Covington, Kentucky, and Cincinnati, Ohio, sued the City of Covington in the Circuit Court of Kenton County, Kentucky, to enjoin the enforcement of an ordinance of Covington regulating in various ways the operation of such cars, particularly by limiting the number of passengers permitted to be carried inside the cars, and requiring the company to "operate cars in sufficient num-

bers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried" (Rec., 3-4). Plaintiff is the only company operating streets cars in the City of Covington.

The grounds of attack as stated in the petition and amended petition (Rec., 1-8; 24-25), are to the effect that the ordinance is an arbitrary and unreasonable regulation with which it is impossible in essential particulars to comply. The federal grounds set forth in the pleadings are:

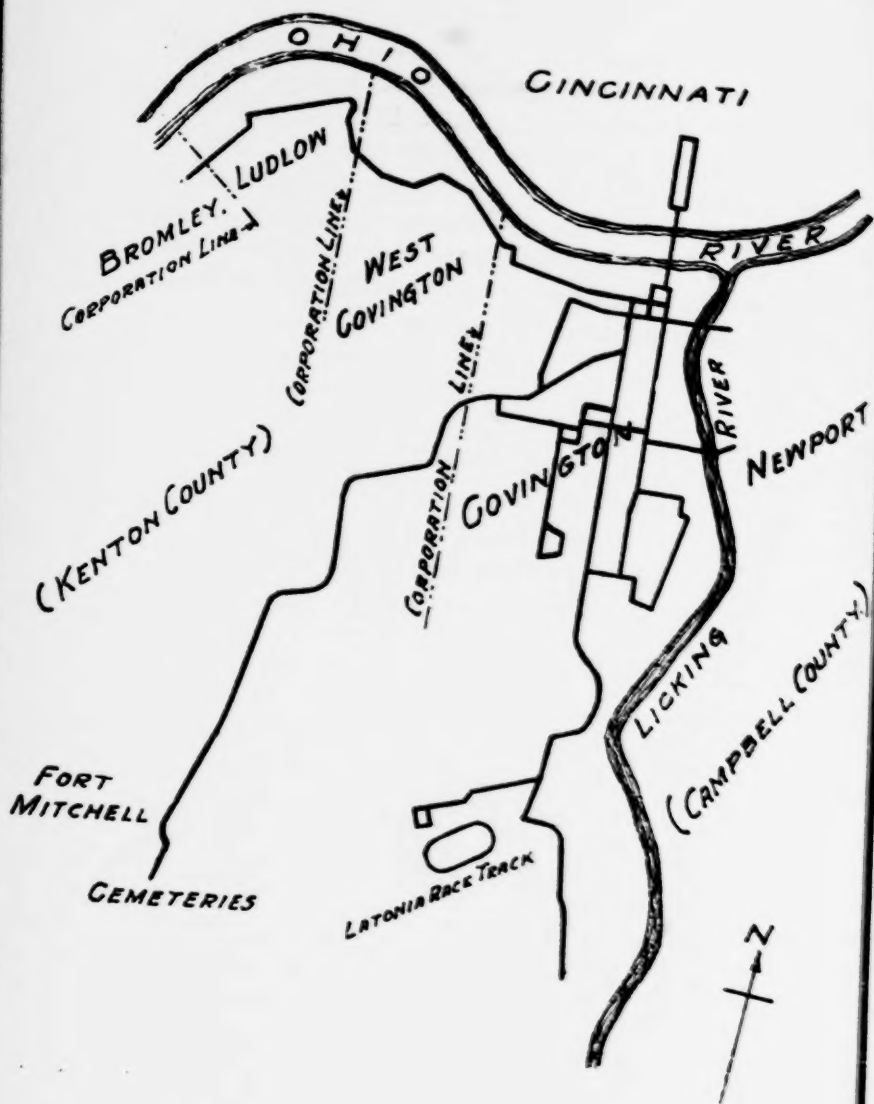
1. The ordinance is an unlawful interference with and regulation of interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.
2. It deprives plaintiff of its property without due process of law, in violation of Section 1, of the Fourteenth Amendment.
3. It is an impairment of the obligation of the contract between plaintiff and the City of Covington, in violation of Article I, Section 10, of the Constitution.
4. The ground for injunction is that the attempted enforcement of the ordinance would result in disorder on the cars, interference with public travel, multiplicity of damage suits and prosecutions, and oppressive penalties.

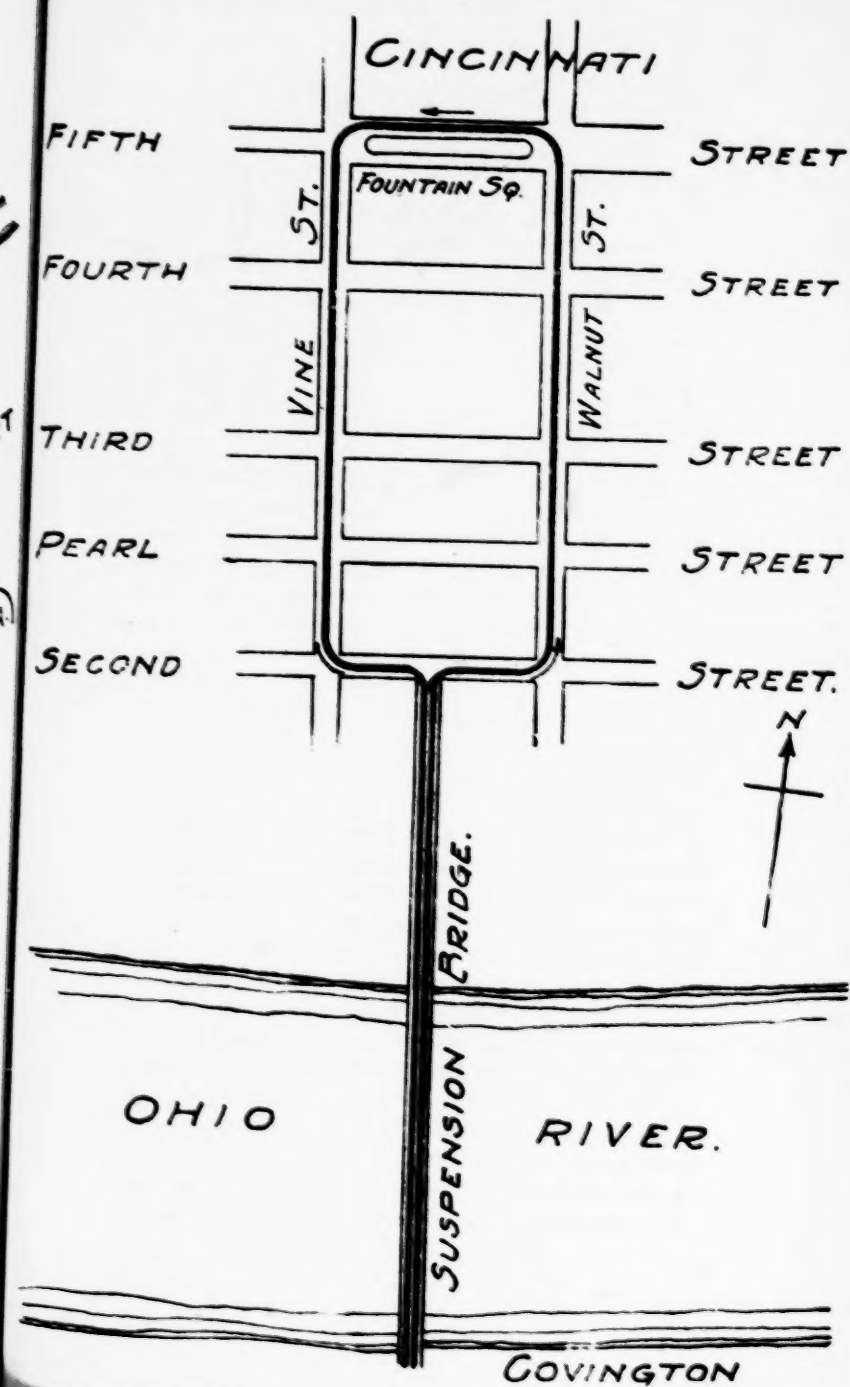
The company supported its allegations by the evidence of James C. Ernst, its President; Thomas J. Green, its Superintendent of Transportation, and W. H. Harton, its Superintendent of Tracks. Their evidence is uncontradicted, the City having offered no testimony.

The Circuit Court granted a temporary injunction, but on final hearing dismissed the petition (26). A judge of the Court of Appeals on motion reinstated the injunc-

tion pending appeal (106). On submission on appeal, the Court of Appeals affirmed the judgment of the Circuit Court (judgment and opinion Rec., 111; 146 Ky., 592). A writ of error was allowed to this court, with an order continuing the injunction in force pending hearing (Rec., 120).

The first of the following maps shows the Covington-Cincinnati routes in outline; the second shows in detail the route in Cincinnati.





ORDINANCE.

The ordinance in question is as follows (Rec., 3-4):

“Council Ordinance No. 4872.

“An ordinance to further regulate the operation of street cars and street car lines in the city of Covington, and providing for the health, comfort, and safety of passengers using said cars and providing penalties for the violation thereof.

“Be it ordained by the General Council of the City of Covington:

“SECTION 1. That it shall be unlawful for any person, corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the City of Covington, to permit more than one-third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same; provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

“SECTION 2. No such person, company or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject

to a fine of not less than five dollars nor more than fifty dollars, recoverable in the Police Court of said City.

"SECTION 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passenger shall be ever permitted to stand by or remain within the enclosure thus provided for the motorman.

"SECTION 4. It shall be the duty of every such person, company or corporation to at all times keep its car thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant and the Board of Health of the City of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

"SECTION 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"SECTION 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines within the corporate limits of the City of Covington to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the General Council of the City of Covington, by

resolution at any time direct that the number of cars operated upon any line or route to be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by Section 2 hereof.

"SECTION 7. Any person, company or corporation, violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the Police Court of the City of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such City and others exercising Police power, to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction. And the Chief of Police is hereby directed to assign at least one Police Officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance.

"SECTION 8. Nothing contained in this ordinance shall be held or construed to be or to effect a renewal or an extension or enlargement of the right of any person, company or corporation to use or occupy the streets and highways of the City of Covington for Street Railway purposes.

"SECTION 9. This ordinance shall take effect thirty days from and after its passage and approval by the mayor."

Approved October 24, 1910.

ARGUMENT.

The problem of adequate street car service at the rush hours has never been solved in any American city, but Covington disposes of it at one stroke, imposing its solution on the company, by limiting the number of passengers to be carried in each car and requiring the company, under heavy penalties, and in the face of insuperable obstacles to furnish sufficient cars at all times. The ordinance prescribes and penalizes results, and places the burden of chance and prohibitive conditions upon the company.

When the ordinance was before Council the company was denied all opportunity for a hearing (86: 68-69).

I.

It is an Unlawful Interference With and Regulation of Interstate Commerce.

It was not contended nor held below that the ordinance is limited in its terms or meaning to *intra* state commerce. All that the Kentucky Court of Appeals said on the subject is as follows (114):

“It is insisted that the ordinance interferes with interstate commerce. The railway company is a Kentucky corporation; it has no franchise or property except in Kentucky. While its cars run into Cincinnati, when they pass the State line, they are operated by an Ohio corporation. The Kentucky corporation is not engaged in interstate commerce; it simply carries the passengers to the State line. The Ohio corporation there receives them and carries them on to their destination in Cincinnati. We are utterly

unable to see that there is any question of interstate commerce in the case. The ordinance is only in force in the City of Covington, and certainly the State of Kentucky may regulate a common carrier doing no business except in the State of Kentucky, and having no property except here. (*Missouri Pac. R. R. Co. v. Kansas*, 216 U. S., 262.)"

We submit that the learned court below is clearly in error in its statement of fact as well as in the legal conclusion which it draws therefrom. Upon this question the court will consider the evidence below. *Southern Pacific Co. v. Schuyler*, 227 U. S., 601, 611.

The evidence on the subject is undisputed and is as follows:

Under the charter of the company (76), its business is the operation of street railways "in the City of Covington and vicinity." It has power to

"purchase, lease, consolidate with, acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport or vicinity." (77.)

Its very name indicates that its purpose was to carry passengers between Covington, in the State of Kentucky, and Cincinnati, in the State of Ohio.

By the ordinance of the City of Covington under which it operates (78), it is required to carry passengers by a continuous ride for a five cent fare

"from any point on its lines in the City of Covington * * * to Fourth street or to Fountain Square in the City of Cincinnati and from Fourth street or Fountain Square in the City of Cincinnati to any point upon its lines in the City of Covington."

Its cars are operated across a bridge which this Court has held to be an instrument of interstate commerce, (*Covington, etc., Bridge Company v. Kentucky*, 154 U. S., 204.)

Every car operated by the company in the City of Covington, under normal conditions, is at the time of its operation going to or coming from Cincinnati in the State of Ohio. (Rec., 28; 31.)

Seventy-five to eighty per cent. of the passengers carried in the City of Covington are riding from Covington to Cincinnati, or from Cincinnati to Covington, or beyond (31).

This interstate character of its business has been the same for nearly forty years (15; 27-28).

The Kentucky towns through which the Covington cars operate, and their population, appear on page 26 of the record, under Kenton County. Some of them operate through Newport.

These places are essentially suburbs of Cincinnati, and most of their residents are employed or have their places of business in Cincinnati (37). For instance, there are no hotels or theaters in Covington (74).

While the franchise rights in Cincinnati are in the name of the Cincinnati, Newport and Covington Railway Company, that company and plaintiff are under the same ownership; the same cars are operated by continuous trips through both cities without change of motormen or conductors and under direction of the same officers, and are actually operated in Cincinnati by the plaintiff company (Rec., 32, 60, 66-67, 69).

Even if the cars operating in Covington were carried by the plaintiff company to the state line and there turned over to the management and the employees of another company for operation in Ohio (which we have seen is not the

fact) such cars would nevertheless be engaged in interstate commerce while operating in the City of Covington, because they in fact go into another State and carry passengers by a continuous ride and for a single fare into that other State. So the cars on their return from Ohio into Kentucky are engaged in interstate commerce in Kentucky because they are carrying to their destination passengers taken on in Ohio to be carried across the state line by a continuous trip and for a single fare.

In *C., N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S., 184, the court held that the Georgia Railroad Company, a Georgia corporation, whose entire road was within the State of Georgia, was engaged in interstate commerce and was subject to the provisions of the interstate commerce act when carrying within the State of Georgia freight which it had received from another road outside of the State for delivery to points within the State. The court said on page 192:

“But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce.”

In *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S., 114, it was held that a railroad which is a link in a through line of road by which passengers and freight are carried into a State from other States and from that State to other States, is engaged in the business of inter-

state commerce, and that a tax imposed by such State upon the corporation owning such road for the privilege of keeping an office in the State, for the use of its officers (it being a corporation created by another State) is a tax upon interstate commerce and unconstitutional. The court cited the case of *The Daniel Ball*, 10 Wallace, 557, in which the Steamer Daniel Ball was engaged in transporting goods on Grand River, wholly within the State of Michigan, destined for other States, and goods brought from other States destined for places in the State of Michigan, but did not run in connection with, or in continuation of any line of vessels or railway leading to other States. The court held:

“So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States,” etc.

In *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co.*, 167 U. S., 633, the railway company was a corporation of the State of Michigan, operating a railroad wholly within that State, running from Detroit to Grand Haven. The question before the court was whether that road was bound to obey an order of the Interstate Commerce Commission relative to affording free cartage at the City of Grand Rapids and the City of Ionia, both within the State of Michigan. The court while refusing to enforce the order in question, for the reasons therein stated, found that the road, by virtue of its connections with other roads, was engaged in interstate commerce. The court said on page 642:

“It must be conceded that a state railroad corporation, when it voluntarily engages as a common carrier in interstate commerce by mak-

ing an arrangement for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the act of Congress."

In *Louisiana Railroad Commission v. Texas & Pacific Railway Co.*, 229 U. S., 336, staves and logs had been shipped by rail from Leesville, La., to New Orleans, La., on bills of lading reading between those points. Upon the order of the consignee in New Orleans, they were there unloaded and delivered to a steamship for export. There was no contractual or other relation between the railroad and the steamship line, neither was there a joint rate or through bill of lading. Yet the court held that the goods, while in transit on the railroad and within the state, were in foreign and not intrastate commerce, because the intrastate carriage was but a part of the whole journey on which the goods were originally started. The court said on page 341:

"The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading which determines Federal or State control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for trans-shipment at New Orleans."

Texas & New Orleans R. R. Co. et al v. Sabine Tram Co., 227 U. S., 111, was a similar case, except that the

shipper for the initial, intrastate trip, the Sabine Tram Co., was not concerned in or connected with the subsequent export. The only intent to export was that of the purchaser or consignee, W. A. Powell Co. Ltd. The bills of lading were for delivery at the intrastate destination, to the Sabine Tram Co. "notify W. A. Powell Co. Ltd." and were sent through a bank to the Powell Company with draft attached, upon payment of which the Powell Company received the bills of lading and caused the lumber to be loaded on ships for export. So that not only was the railroad transportation entirely intrastate, but at its termination, and still within the State, title and possession passed to the purchaser, or consignee. Yet the court held that such railroad transportation was foreign and not intrastate commerce.

On the facts in this record the motormen and conductors of the plaintiff in error are clearly engaged at all times in interstate commerce, so as to bring them under the terms of the Federal Employers' Liability Act, even on the assumption that the cars are operated by a different company in Cincinnati.

In *St. Louis, S. F. & T. R. R. Co. v. Scale*, 229 U. S., 156, the court held the act applicable to the employee of a Texas corporation in connection with an interstate train, although such corporation operated only to the State line where it connected with another corporation which operated the train in Oklahoma, and this although the interstate train in question was as a matter of fact broken up at the State line.

We have cited these cases to show that plaintiff in error would be engaged in interstate commerce in Covington, even if its cars were turned over at the State line to another company, as suggested by the court below.

As we have seen, however, the evidence is clear that as a practical matter, plaintiff in error, by the same officers and employes, operates the cars continuously through the entire interstate journey. As the court said in *Swift & Company v. U. S.*, 196 U. S., 375, "commerce among the states is not a technical legal conception but a practical one, drawn from the course of business."

Missouri Pacific Railway Co. v. Kansas, 216 U. S., 262, cited by the Court below as authority for its conclusion is an entirely different case. There "the act commanded to be done was simply that a passenger train service be operated over the branch line within the State of Kansas." (P. 276.) The court held that

"the order does not deal with an interstate train or put any burden upon such train, but simply requires the operating within the state of a local train." (P. 284.)

The circumstance relied upon by the company to show that the order affected interstate commerce was that it could more conveniently comply with the order by running such local train to terminals across the State line than by stopping at or within the State line. The court held that such operation would be at the mere election of the corporation and that the order did not have a direct or necessary effect on interstate commerce. That case is obviously inapplicable here.

In the case of *Omaha & Council Bluffs St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S., 324, the Court, while holding that the interstate commerce act does not apply to street railways, said on page 336:

"When these street railroads carry passengers across a state line they are of course engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887."

A DIRECT REGULATION.

This ordinance necessarily affects and regulates interstate commerce directly, for practically every car to which it applies is at all times engaged in interstate commerce; the ordinance necessarily affects the number of passengers carried in each car in interstate commerce and the number of cars to be furnished to carry interstate passengers, for whose carriage the road is principally operated.

The number of passengers taken on the cars in the City of Cincinnati for carriage to their places of residence in Covington, or beyond the City of Covington, is necessarily regulated by the ordinance, because as soon as the car enters Covington it comes under the provisions of this ordinance. The number of passengers taken on in the City of Covington, or at any point outside of the City of Covington, for transportation to Cincinnati, is necessarily regulated by this ordinance in the same manner. For the same reason the supply of cars for the carriage of passengers to and from Cincinnati is directly regulated by this ordinance.

The ordinance also requires certain prescribed railings on the platforms (Sections 2 and 3); that the temperature of the cars shall never be permitted to be below 50 degrees Fahrenheit (Section 5), and that the inside of every car shall be fumigated once a week (Section 4).

The title of the ordinance shows that its purpose was to "regulate the operation of street cars and street car lines in the city of Covington," and as such cars and car lines are principally engaged in interstate commerce, it is hard to conceive of a more comprehensive or direct operation upon interstate commerce. The only substantial factor in that commerce not covered by this ordinance is the matter of fares.

VOID AS DIRECT REGULATION.

Such a direct regulation of interstate commerce was not within the power of the City of Covington or State of Kentucky, even in the absence of federal legislation on the subject.

The principal occupation of the cars and car lines so regulated is the carriage of passengers from points in Kentucky to points in Ohio, and from points in Ohio to points in Kentucky by continuous trips and for a single fare. The principal purpose and effect of the ordinance is to prescribe and regulate the facilities for such interstate carriage. It is not a subject for regulation by different and perhaps conflicting ordinances of the two cities concerned, but rather for regulation, if at all, by a single authority.

In *The Minnesota Rate Cases*, 230 U. S., 352, the court in reviewing the general principles governing the exercise of state authority when interstate commerce is affected, said on pages 399-400:

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and when

Congress does act, the exercise of its authority overrides all conflicting state legislation."

In *Hall v. DeCuir*, 95 U. S., 485, a statute of Louisiana required all common carriers in that state to give all persons traveling in that state equal rights and privileges in all parts of the conveyance by which the travel was conducted, without distinction on account of race or color. Defendant's intestate was the owner of a steamboat plying between New Orleans, La., and Vicksburg, Miss., plaintiff was a person of color traveling from New Orleans to Hermitage, both within the state of Louisiana, who was refused accommodations on account of her color in the cabin specially set apart for white persons. She sued for damages under the above mentioned statute and recovered a judgment. Defendant claimed that the statute was void as to him, in respect to the matter complained of, because it was an attempt to "regulate commerce among the states." This court held that it was such an attempt and reversed the judgment.

The court said on pp. 488-489:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His dis-

position of passengers taken up and put down within the state, or taken up within to be carried without, can not but affect in a greater or less degree those taken up without and brought within and sometimes those taken up and put down without."

Also on page 489:

"If each state was at liberty to regulate the conduct of carriers while within its jurisdiction the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce can not flourish in the midst of such embarrassments."

So in the case at bar, if Covington may regulate the number of cars, the number of passengers in each car, heating, fumigating, railings and the like, so may Cincinnati; and such regulations may be conflicting and inconsistent.

As a matter of fact it appears from the evidence that plaintiff in error, in response to an Ohio law, placed vestibules on the front platforms of its cars, which, in connection with the railings provided by the Covington regulation, would have the effect to destroy the use of the front platforms as a means of ingress and egress. (Rec., 46.)

The court further said on page 490 in the case just cited:

"As was said by Mr. Justice Field, speaking for the court in *Welton v. The State of Missouri*, 91 U. S., 282, 'inaction (by Congress) * * * is equivalent to a declaration that interstate commerce shall remain free and untrammelled.' Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned."

The doctrine is well established in this court that the separation of white and colored passengers, so far as it affects interstate commerce is not a subject for regulation by a state.

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Illinois*, 177 U. S., 514, the court held unconstitutional a statute of Illinois requiring every railroad corporation to stop all regular passenger trains at county seats. It was suggested in support of the law, that the statute being operative only in the state of Illinois did not directly affect interstate commerce, but the court said on page 522:

"While the statute in question is operative only in the state of Illinois, it is obnoxious to the criticism made of the Louisiana statute in *Hall v. DeCuir*, 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. * * * If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unneces-

sary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others.' The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares; requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

In *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S., 204, the court held that the bridge over which plaintiff's cars are operated is an instrument of interstate commerce and that the state of Kentucky did not have power to fix the tolls thereon. The court said on page 220:

"It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right,

and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state, (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions."

In *Louisville & Nashville Railroad Co. v. Eubank*, 184 U. S., 27, the court held that the long and short haul section of the Kentucky Constitution (Section 218) was invalid as being a regulation of interstate commerce because it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law.

The court said on page 36:

"We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

The court said on page 35:

"That the railroad commission is authorized upon application to permit the company to charge less for a longer than for a shorter distance, is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal."

NOT STRICTLY A POLICE REGULATION.

Of course in the absence of federal legislation on the subject, a state may impose reasonable police regulations which do not constitute a direct burden upon interstate commerce.

We claim, and we believe we have shown, that this ordinance in its essentials is a comprehensive and direct regulation of interstate commerce and not a mere police regulation. If it be said that Council regarded the limitation of the number of passengers permitted to stand within the cars as bearing upon the public health, we call

attention to the fact that the operation of the ordinance in this regard is suspended on three days, the Fourth of July, Decoration Day and Labor Day, when the overcrowding would probably be very great, although not more so, as appears by the evidence (Rec., p. 73) than on many other days. It can not be consistently claimed that a given regulation is necessary to health on one day and not on other days when conditions are similar.

But the provision about the number of passengers permitted to stand within the cars is coupled, as we have seen, with the provision relating to the supply of cars and the ordinance as a whole relates to the facilities of travel.

In the case of *Herndon v. Chicago, Rock Island & Pacific Railway Co.*, 218 U. S., 135, where the court enjoined the execution of legislation of the state of Missouri requiring the stoppage of trains at junctions, the court said on page 137:

"It is to be remembered that this statute is not of that class passed in the exercise of the police power of the state for the promotion of the public safety and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad—this statute, as its second section shows, was passed for the purpose of providing greater facilities of travel, and not for the protection of life and limb."

THE ORDINANCE IS ARBITRARY AND UNREASONABLE.

Even considering the ordinance as a police regulation it is unreasonable, oppressive and in many respects impossible of performance.

This is apparent from the face of the ordinance as applied to well known conditions in any city. It is especially so in view of the actual conditions to which it applies.

In *Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U. S., 335, the court had under consideration an order of a State Railroad Commission stopping interstate trains at stations. The court said on pages 344-345:

"In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary to examine the facts upon which they rest and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the state or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts."

The facts as shown by the undisputed evidence are as follows:

CAR SUPPLY.

The evidence shows that it is impossible in the rush hours on any day, to run through Cincinnati, with the only facilities the company has or is able to get, enough cars to comply with this ordinance (Rec., 30 *et seq.*). It is alleged (Rec., 6) and not denied, that there is only one bridge across the Ohio river between Covington and Cincinnati over which street cars may be operated, and that is the Suspension Bridge (Rec., 52.) Plaintiff's only right of way in Cincinnati is on Second, Walnut, Fifth and Vine Streets (Rec., 52). It is the only practicable route for reaching Fountain Square and the business part of Cincinnati, where the Covington people desire to be carried (Rec., 91-92). Frequent efforts have been made to obtain some change in the routes or their use, in Cincinnati, so as to reduce the congestion which obstructs

plaintiff's cars, but without great success, (Rec., 52-3), although substantial improvement was made from time to time (Rec., 62-63). But plaintiff has not been able to do more than it has done, because the situation is in the control of the Cincinnati Traction Company and the City of Cincinnati (Rec., 52-53).

In the evening rush hour, from five to six, plaintiff runs 81 Covington cars over its route in Cincinnati (Rec., 36). Thirteen trips were added in the year 1910 (Rec., 48). During the hour in question "the cars are waiting there continuously to get around" (Rec., 44). The evidence of Green, Superintendent of Transportation (page 30 *et seq.*) shows, in detail, the conditions in Cincinnati, which render it impossible for plaintiff to operate any more cars at the rush hour. This is not contradicted.

There is no claim on the part of the City of Covington that any additional or improved facilities could be obtained in Cincinnati.

The situation can not be met by transferring to or from additional cars on the Kentucky side of the river. Experience and the track situation show this to be impracticable (55-6, 69-70).

The evidence of Mr. Green and Mr. Ernst, which is not long, and which we ask the Court to read in full (pages 27 and 51) shows the conditions in Covington, fluctuations of travel, grade crossings, etc., which render a compliance with the ordinance impossible in this respect.

A further objection to this provision of the ordinance is to be found in the fact that it took effect within 30 days from the date of its passage. No time was allowed for increasing facilities, either in the way of tracks or equipment. The evidence shows that the plaintiff uses at the rush hours all of the equipment which it owns (Rec.,

48); that to comply with the ordinance, if otherwise practicable, would require a fifty per cent. increase in its present number of cars owned (49) or about 33 cars, and that it would take at least five months to get from 10 to 20 new cars and have them in operation (Rec., 53).

Yet, in spite of this objection, the court below held:

“If the company can not provide the necessary accommodation for the travelling public on the cars it has, it must provide itself with more cars,” etc. (Rec., p. 115.)

In view of the undisputed facts, the ordinance, if otherwise valid, in respect to the car supply, should have given the company time to obtain the additional equipment necessary to comply with it, if such a compliance were in other respects practicable.

LIMIT OF PASSENGERS.

The petition alleges and the evidence shows, (a) That the cars of plaintiff are capable of carrying, without danger to person or health, a greater number of passengers than those permitted by the ordinance; (b) That some cars afford a larger standing capacity relative to their seating capacity, than others (89-98).

The ordinance limits the number of passengers permitted to stand within the car. No limit is placed on the number permitted on the back platform.

This regulation places an obligation upon the company, not merely with reference to the number of passengers which it shall take upon its cars, but also, with reference to the place which they shall occupy after they become passengers with the right to stay upon the car. It is, therefore, impracticable for the conductor to prevent the relation of passenger being acquired, because *non constat*

but the proposed passengers may intend to ride upon the platform, and it is made obligatory upon the conductor, after the passengers become such, to keep a certain number of them upon the back platform.

The evidence shows, and it will be apparent to the court, that persons who properly become passengers upon the back platform may, owing to weather conditions, desire later to enter the car. This is especially likely to happen (page 37) when a car starts to cross the Suspension Bridge, a time when the conductor is in the front of the car collecting fares.

If this should happen, and the conductor being otherwise occupied, did not observe the fact, the company might be subject to a fine as soon as the car reached Covington. If the conductor saw it and asked the passenger to leave, and the passenger refused, the company would still be subject to fine, unless the conductor should, by main force, put such passenger out on the rear platform.

It is not sufficient to say that the Court may assume that passengers on the cars will be ^{as} law abiding. The ordinance does not make any distinction between passengers who are law abiding, and those who are not. It is the presence of the additional passenger or passengers within the car which furnishes a basis for the imposition of the fine.

The ordinance does not prohibit the passenger from going into the car. The company is punished if he goes in, and thus makes the number standing within exceed the limit of the ordinance; but there is no penalty against the passenger who goes into the car in violation of this regulation, even if his attention is called to it. The evidence shows in this case, if indeed any evidence be necessary, that there are certain places and times when people

crowd upon the street cars. Cases in point are the rush hours in Covington and Cincinnati, race meetings at Lattonia, etc. The public will endeavor to crowd upon the cars, and there is no reason, from their standpoint, why they should not do so. They are not violating any ordinance for which they can be punished. Yet the conductor is required, not only at the time they get on the car, but at all other times during the trip, to see that the proper number of them remain on the back platform.

OTHER PROVISIONS.

Sections 2 and 3 of the ordinance require certain prescribed railings on the platforms. This provision, like the remainder of the ordinance, was to take effect within 30 days and a violation of its terms would expose the company to a fine. The evidence shows (Rec. pp. 38, 46, 54-55, 89, *et seq.*), that many of plaintiff's cars were not adapted to such railings and that the effect of placing the railings on such cars would be to obstruct the ingress and egress of passengers and destroy the use of the platforms as standing room for passengers.

Ordinarily statutes or regulations requiring any alteration in the construction or equipment of cars give a substantial period of time in which to make the changes and sometimes provide that the required construction shall apply only to new equipment as purchased. For instance, the federal safety appliance act of 1893 gave the railroad companies until 1895 to install the grab irons and hand holds and conform to a standard height in the matter of draw bars, and until 1898 to install safety brakes and automatic couplers. Power was given in the same act to the Interstate Commerce Commission to extend the time to any road upon a showing of good cause therefor.

The evidence shows that it would take at least a month to put on the necessary railings on the various cars, after devising them and preparing the plans (Rec., 54) and, as we have seen, it would have taken several months to obtain the necessary new equipment.

This ordinance, however, ignores the actual character of the company's equipment, as it does many other facts, and arbitrarily requires compliance with the ordinance within 30 days.

The provisions with reference to the railings are also objectionable because they diminish the carrying capacity of the cars at the same time that the ordinance requires the company to furnish enough cars at all times to carry the traveling public.

Section 5 of the ordinance provides that the temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit. The evidence shows that the company's cars are equipped with the best electric heaters but that the requirements of Section 5 are impossible of performance because of the constant opening and closing of the doors and the interference with the ventilators by the passengers (Rec., p. 58).

The trial court held this provision clearly objectionable but declined to enjoin the operation of the ordinance merely because of the one objectionable feature.

Section 4 of the ordinance provides that the inside of every car shall be fumigated once a week. The evidence shows that the cars are kept thoroughly clean by the ordinary processes of washing and airing, and that fumigation is a difficult, expensive and impracticable process (Rec., p. 104).

INVALID BECAUSE UNREASONABLE.

Even considered as a police regulation the ordinance is unreasonable and hence an unlawful burden on interstate commerce.

Referring again to the summary of the general principles on this subject in the Minnesota Rate Cases, the court says that States have no power

“to subject the operation of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection” (p. 401).

This rule may be illustrated by decisions relating to various laws and regulations designed to benefit the traveler or shipper.

Car Supply Cases.

In *Houston & Texas Central Railroad v. Mayes*, 201 U. S., 321, the court held void, as a violation of the commerce clause of the Constitution, a statute of the State of Texas requiring a railroad engaged in interstate commerce to furnish a certain number of cars on a specified day to transport merchandise to another state and making no exception to its operation, except in cases of strikes or other public calamity. The proceeding in this court was to set aside a judgment of the State Court which the defendant in error, a shipper, had recovered because of delay by the railroad in violation of the statute. The railroad did not offer any excuse for the delay but merely defended on the ground that the statute as drawn was an unreasonable burden upon interstate commerce. The court said on page 329:

“While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle

and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

In the case of *Southern Railway v. Commonwealth*, 107 Va., 771, the court had under consideration a rule of the State Corporation Commission requiring a carrier to furnish cars on four days' notice and imposing for its violation a fine of one dollar per day per car.

The carrier was charged with a violation. There was no special defense except that the cars in question were for interstate shipments and that the rule as applied to them was unconstitutional. The court held that the rule was

"not rendered less absolute and inexorable by rule 20 of the series * * * whereby the commission reserves the right at all times and under all circumstances 'whenever justice demands such action, to suspend the operation of these rules or any one or more of them in whole or in part.' * * * The constitutional validity of a law is to be tested not by what has been done under it, but by what may be done." (P. 777.)

The court further said (pp. 779-780):

"It is also true that in the Texas case (*Houston & Texas, etc., R. R. v. Mayes*) the statute under review * * * was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a washout or sudden congestion of traffic or unavoidable detention of cars in other States or in other places in the same State, or any other circumstances which the court declared should excuse the railroad company from furnishing cars applied for. In other words the court took judicial notice of the fact that such conditions might arise, and for that reason the statute was 'likely' to do great injustice to the roads, and therefore declared that the statute was an unreasonable burden upon interstate commerce, and invalid so far as interstate shipments were concerned," etc.

In the case of *Yazoo & Mississippi R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, the court had under consideration certain rules of the Railroad Commission of Mississippi, relative to demurrage. Penalties had been allowed against the carrier—the greater part of them before Congress had legislated upon the subject by the passage of the Hepburn Act. The court held that independent of direct legislation by Congress on the same subject, the rules in question were invalid. The court said on page 3:

"Approaching the subject from this point of view, we think the rule of the State Commission upon which the right to all the so-called 'delayage penalties,' was based, constituted an unrea-

sonable burden upon Interstate Commerce, within the decision in *Houston & T. C. R. R. Co. v. Mayes*, 201 U. S., 321, 329, since the requirement as to the delivery of cars within the short period fixed in the rule, is absolute and makes no allowance whatever for any justifiable and unavoidable cause for failure to deliver."

Delivery on Siding.

In *McNeil v. Southern Railway Co.*, 202 U. S., 543, the Railroad Commission of North Carolina made an order requiring the railway company to deliver cars from another state to the consignee on a private siding beyond the railroad's right-of-way. The railroad filed a bill to enjoin the enforcement of the order. The trial court issued the injunction and this court affirmed the decree below saying on page 561:

"Without at all questioning the right of the State of North Carolina, in the exercise of its police authority, to confer upon an administrative agency, the power to make many reasonable regulations, concerning the place, manner and time of delivery of merchandise moving in the channels of Interstate Commerce, it is certain that any regulation of such subject made by the state or under its authority, which directly burdens Interstate Commerce, is a regulation of such commerce and repugnant to the Constitution of the United States."

Stoppage of Interstate Trains.

In *Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U. S., 335, the railroad company was ordered by the Railroad Commission to stop certain passenger trains at the town of Magnolia. The railroad company brought suit to enjoin the enforcement of the

order. It was held by this court that the railroad company was entitled to the injunction on the ground that Magnolia had adequate facilities and the order for the stoppage of additional trains was unreasonable. The court said on page 346:

"The order can not be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The Legislature of a state could not itself make such an order, and it can not delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished."

Atlantic Coast Line Railroad Co. v. Wharton et al, 207 U. S., 328, was a similar case and the order in question was held invalid, the court saying on page 334:

"That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

See also *Herndon v. Chicago, Rock Island & Pacific Railroad Co.*, supra.

Duties of Initial Carrier.

In *Central of Georgia Railway Co. v. Murphy*, 196 U. S., 194, the court held that the imposition upon the initial or any connecting carrier of the duty of tracing the freight and of informing the shipper in writing when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the federal constitution.

Express Wagons on City Streets.

In *Adams Express Co. v. City of New York*, 232 U. S., 14, the enforcement of ordinances of the city of New York applying generally to drivers of express wagons and hacks was enjoined, so far as it applies to the interstate business of the express company, as being unnecessarily burdensome. The court said on page 33:

"We may assume the propriety of suitable provision to ensure careful driving over the city streets and the existence of ample power to meet this local necessity. It is also clear that regulations for this purpose, when the movement of interstate traffic is involved, should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend."

CONSTRUCTION OF SECTION SIX.

The ordinance (Section 6) requires the company
 "to run and operate cars in sufficient numbers
 at all times to reasonably accommodate the pub-

lie within the limits of this ordinance as to the number of passengers permitted to be carried."

In maintaining the reasonableness of this provision, the court below says (116):

"The rule at common law is that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried. This rule of the common law is to be read into Section 6 of the ordinance. *It is the duty of the defendant under the ordinance to run and operate cars in sufficient numbers at all times to reasonably accommodate the public as there provided, in so far as in the exercise of ordinary care, it has reason to anticipate that such an amount of accommodation will be necessary.* When Section 6 is thus read it is not unreasonable or arbitrary or impracticable of enforcement. The company will not be responsible for not furnishing a sufficient accommodation to accommodate a crowd which it has not reason in the exercise of ordinary care to anticipate. But it should exercise ordinary care to provide cars that will reasonably accommodate the passengers which may reasonably be anticipated." [Italics ours.]

This construction of the ordinance does nothing more than relieve the company from a failure to foresee a demand which it has no "reason to anticipate." Roughly speaking, such "reason to anticipate" is the equivalent of notice to the company of the demand at a given time and place. But the court's construction of the ordinance does not relieve the company of its inability to meet the demand.

For instance, the company knows, of course, what the ordinary demands are at the rush hours. The evidence

shows it could not meet these demands "within the limits of the ordinance as to the number of passengers to be permitted to be carried" especially in the matter of getting its cars through Cincinnati—an essential part of each trip. From this unavoidable default and the consequent penalties, neither the language of the ordinance nor the construction by the court below will relieve the company. In fact, as we have seen, the court below held the Cincinnati situation immaterial.

The ordinance does not make any exception in case of actual inability to furnish the cars, or because of any of the conditions which the evidence shows might affect the car supply. The only exception made by the ordinance, as construed, is where the company "has not reason in the exercise of ordinary care to anticipate" the crowd seeking accommodation.

In the case of *Houston & Texas Railroad Co. v. Mayes*, *supra*, the law under consideration required the shipper to give express notice to the railroad of the number of cars required and the railroad had six days within which to furnish them. This was even better for the railroad than the "reason to anticipate" which the court below concedes to the street railroad company. This court, however, held the law invalid as transcending the police powers of the State, because it did not make express exceptions in typical cases of actual inability to furnish cars.

The holding of the court below that "the rule of common law is that a carrier must provide reasonable accommodations for such number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried," is, we submit, too broad even as a general proposition.

But it can not be claimed to be a rule of the common law that a street railroad company is bound to limit the

number of passengers standing within its cars to one-third of the seated load (especially where the cars have different capacities in this regard) and that it must furnish enough cars to carry the public in that manner even at the rush hours, when, as shown by the evidence, it is unable, owing to conditions over which it has no control, to run enough cars over its route to supply the demand.

It has been suggested in former arguments of this case, that the use of the word "reasonably," in the language just quoted from the ordinance, would relieve the company from penalties in cases of actual inability to furnish cars, for any of the reasons shown in the pleadings and evidence in this case.

As we have seen, the court below did not so construe the ordinance. Neither the plaintiff in error nor this court can be asked to assume, in view of the language of the ordinance, that such construction would be placed upon it in its actual enforcement.

Under the terms of the ordinance, the company must "run and operate cars in sufficient numbers at all times" to accomplish a specified result, namely, "to reasonably accommodate the public within the limits of this ordinance as to the number of people to be carried." The word "reasonably" is a part of the description of the result; not of the means.

For instance, passengers residing in a remote part of Covington might not be entitled, in view of the amount of travel in that locality, to have cars oftener than fifteen minutes apart, while in the more thickly settled parts of the city passengers would be entitled to cars every five minutes. Such schedule would be in each case the "reasonable accommodation" meant by the ordinance. Now, if a passenger in either place had to wait half an hour for a car, he might not be "reasonably" accommodated,

even though the company had a perfectly good excuse for the delay.

The suggested construction of the ordinance would, in any event, make it objectionable as a regulation of or an unreasonable burden upon interstate commerce, because it would permit the respective courts and juries, before whom the prosecutions came, to act as *quasi-commerce* commissions, adjudicating from time to time in specific cases what service should have been furnished to interstate passengers and acquitting or punishing the carrier according to whether it had, in the opinion of the jury, furnished such service or not.

Even considered purely as a penal ordinance it would, if so construed, be objectionable, without regard to its effect upon interstate commerce.

In *Tozer v. United States*, 52 F., 917, the "undue preference" clause of the interstate commerce act was held by Mr. Justice Brewer, to be indefinite and uncertain. He said:

"In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

In *L. & N. Railroad Co. v. Commonwealth*, 99 Ky., 132, the foregoing language was quoted with approval by the Kentucky Court of Appeals, which held that a statute of Kentucky penalizing the charge and collection of "more than a just and reasonable rate" was invalid because of its indefiniteness. The Court of Appeals said (p. 136):

"The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter de-

pend on many uncertain and complicated elements."

So in the case at bar, if the ordinance were to receive the suggested construction, the criminality of plaintiff's act would depend upon the jury's view of the reasonableness of the car supply, and this latter would depend on many uncertain and complicated elements.

The Court of Appeals said further:

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions we are not able to comprehend the force of our organic laws."

This is not contrary to the view taken by this court in the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S., 86,

where the court held that a statute of Texas was not too vague and uncertain, which denounced contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, and acts which "tend" to accomplish the prohibited results. The court in distinguishing the cases of *Tozer v. U. S. and L. & N. Railroad Co. v. Commonwealth*, *supra*, said:

"But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

It is further to be noted that there was no question of interstate commerce in that case.

In *Ex parte Young*, 209 U. S., 123, 164, in considering the question of remedy, the court held that the reasonableness of a rate was not a proper subject for investigation by a jury.

This ordinance is not to be considered, however, as merely a penal statute. It is a state regulation of interstate commerce. Whatever might be a state's policy toward leaving the regulation of *intra*-state commerce practically to a series of juries, a municipal ordinance regulating *inter*state commerce, which has such an effect, can not be sustained.

It seems clear to us that the ordinance, in view of its terms and of the construction placed upon it by the court below, is not open to the suggested construction; but the ordinance means either that the company is to be punished for *any* failure to furnish cars to supply a demand which it has reason to anticipate, or that it is to be punished for any such failure as a state court or jury thinks ought not to have occurred.

In either case, as applied to interstate commerce, it is an unlawful regulation of and burden upon such commerce.

II.

The Enforcement of the Ordinance Would Deprive Plaintiff of its Property Without Due Process of Law, in Violation of Section 1 of the Fourteenth Amendment.

It appears from the testimony of the President of the Street Railway Company (Rec., 68-69, 86) that he made an oral request of the Board of Council and a written request of the Board of Alderman for a hearing upon this ordinance before it was passed, and that both were denied. His written request addressed to the Aldermen is found on page 86 of the Record and is as follows:

“OCTOBER 20, 1910.

“To the Board of Aldermen of the City of Covington, Ky.:

“Gentlemen: An ordinance has been passed by council and is now before you, to regulate the number of passengers to be carried on street cars and the number of cars to be operated by the company for the carriage of passengers and for other purposes therein set forth.

“This ordinance in its present form was submitted to Council on the tenth day of October, 1910, and was passed at the same meeting.

“We respectfully request that before your body acts upon this ordinance it be referred to your appropriate committee for consideration by them for the purpose of giving us and our counsel a hearing.

"This ordinance is drastic in its provisions and far reaching in its consequences for the traveling public and for the company. We believe that it is not only a violation of our rights under our ordinance but that a compliance with it would be utterly impossible. Furthermore, if the company should endeavor to comply with it as far as it is physically possible to do so, it would result in great inconvenience and discomfort to the traveling public.

"It is but fair and just that we should be given an opportunity to lay before you the facts in support of our position, both as to the practicability and the legality of this measure. What we request is nothing more than the usual practice of your Board and of other City Councils with reference to important measures.

"Respectfully,

"J. C. ERNST, *President.*"

(This letter appears in the printed record to be dated October 26. This is an error, as the body of the letter itself and the undisputed testimony of Mr. Ernst, page 68, show that the communication was sent before the passage of the ordinance.)

The Alderman paid no attention to this request but proceeded to pass the ordinance immediately.

The penalty for any violation of the ordinance is a fine of not less than \$50 nor more than \$100 for each offense, and each car operated in violation of the ordinance constitutes a separate offense for each day it is so operated. (Section 7, page 4.)

As the evidence shows (Rec., p. 49) that the number of cars operated in Covington each day in the year 1910 was 66, it is apparent to what sum the penalties might reach.

As the Judge of the Court of Appeals said in reinstating the injunction (Rec., p. 106),

"if unable to comply with the ordinance, as plaintiff claims, it might be subjected to fines amounting to several thousand dollars per day."

We submit that the attempted enforcement of such an ordinance, upon all the facts of this case, is in violation of the due process clause of the constitution.

To quote the language of this court in *St. L., I. M. & S. Ry. Co. v. Wynne*, 224 U. S., 354, 359, the ordinance

"is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law."

As the court said in *Chicago, Milwaukee & St. Paul Ry. Co. v. Poll*, 232 U. S., 165, 168,

"The rudiments of fair play required by the fourteenth amendment are wanting."

These cases related to statutes imposing an oppressive liability upon railway companies on damage claims, but the language quoted is none the less applicable here as a statement of the scope and purpose of the due process clause.

In *State ex rel Oregon R. R. & N. Co. v. Fairchild*, 224 U. S., 510, the court held that unreasonable orders of a railroad commission requiring additional trackage, constituted taking the property of a railroad company without due process of law.

Eubank v. Richmond, 226 U. S., 137, held that a municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public

streets and across private property, on the request of less than all of the owners of the property affected, was in violation of the fourteenth amendment. The court in reaching its conclusion said:

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

So in the case at bar, this ordinance may properly be tested by its extreme possibilities, many of which have been cited under the preceding head of this brief.

The enforcement of the severe penalties prescribed in the ordinance would, under the circumstances established in this case, be the taking of property without due process of law.

Ex parte Young, 209 U. S., 123.

Missouri Pacific R. R. Co. v. Tucker 230 U. S., 340.

III.

**It is an Impairment of the Obligation of the Contract
Between Plaintiff and the City of Covington, in
Violation of Article I, Section 10,
of the Constitution.**

Section 5 of the ordinance or contract under which the company operates (Rec., 78, 81) provides that the company

“shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6 A. M. to 5 P. M., and not to exceed five minutes from 5 P. M. to 8 P. M., and not to exceed ten minutes from 8 P. M. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart.”

The evidence shows clearly that the company more than complies with this provision (page 68). During the rush hours it runs cars at a headway of less than one minute, instead of five minutes as required by the foregoing provision (page 32). The ordinance in question in this case, requiring the running of a greater number of cars, is an impairment of the contract.

An examination of the contract (Rec., 78) shows that it was a compromise of existing controversies; that it called for the establishment of new lines, the purchase and employment of new equipment, and the reduction of through fares between Covington and Cincinnati to a regular fare of five cents for a through trip.

The ability of the company to give a five cent fare and its willingness to make such a contract would depend upon the character of service it was required to furnish. Necessarily the most intimate relation exists between the price of service and its cost.

If, as alleged in the petition and shown in the proof the company is able to carry in its cars, and has carried for many years, a greater number of passengers than that permitted by this ordinance to be carried in each car, then a reduction of such number is an increase in the cost of the service to the company. As the contract provides specifically in connection with the fare to be charged, the number of cars to be operated between certain hours, the City has no right to add to the cost of service the burden of running any greater number of cars, especially when this would require additional expenditure for new equipment.

It is obvious that the expense of the service would be greatly increased by an enforced compliance with the ordinance, because even if capable of performance it would require the furnishing of a large number of cars for demands which might and might not occur, as the evidence shows clearly that such demands can not be foreseen.

If it were the law that a city may not fix by contract the frequency with which cars shall be run on any given street car line for a limited period, it would be impossible for a company to agree with a municipality on new lines or extensions, which the company could not afford to undertake unless the requirements as to the frequency of the trips were known in advance, so as to properly estimate the expense.

Moreover the contract relied on did not deal principally with the operation of cars in the City of Covington; it related to the operation of cars between the City of Covington and another city in another state.

It may well have been true, and as we have seen it was true, that the facilities of the company in Cincinnati were restricted and that the company would not have

been willing to undertake a through service to the City of Cincinnati at a specified fare unless it knew in advance how many trips per day, or in certain hours, would be required.

Whatever may be the power of a city to make a contract limiting the service it can demand from a public service corporation within its own territory for a limited period, it certainly has power to make such a contract with reference to transportation between its own territory and that of another city, where the carrier has restricted facilities, and having made such contract and received the benefit, it should not be permitted to plead lack of power.

It can not be contended reasonably that the language quoted from the contract above had any other purpose than to set forth clearly, for the protection of both parties, the extent of the service which the city might require of the company for the consideration named in the ordinance.

If it was intended that the City should reserve the power to require a greater service than that specified in the contract, then the insertion of the language quoted was unnecessary and meaningless.

While the term of the contract was twenty years from the acceptance of the ordinance which was passed October 7, 1892, that period of twenty years had not expired at the time of the filing of the suit and the trial in the court below. Moreover, the 14th paragraph of the contract provides for the payments to be made after the term of the ordinance, in the event that the controversy between the parties had not been settled in court by that time, and also provided for the continuance of the reduced rates of fare.

It will not be contended that the events have happened which would terminate the operation of the contract.

IV.

Injunction is the Proper Remedy.

In *Detroit v. Detroit Street Railway Company*, 184 U. S., 368, the court affirmed a decree enjoining the enforcement of ordinances reducing street car fares, and said (379):

"Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing, but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for, may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary, would, of course give rise to disputes between them and the conductors, and would possibly if not probably, lead to frequent breaches of the peace in the course of these attempts at removal."

See, also,

Cleveland v. Cleveland City Railway Co., 194 U. S., 517, 531.

Ex parte Young, *supra*.

Injunction is the usual remedy in Kentucky. In *South Corington & Cincinnati Street Railway Company v. Berry*, 93 Kentucky, 43, it is said, on page 45:

"If the ordinance was invalid, then to prevent a multiplicity of prosecutions, and such consequences as would necessarily result from its enforcement, the company had a right to ask preventive equitable relief."

In *Adams Express Co. v. City of New York*, *supra*, the court had under consideration ordinances applying generally to express and other businesses within the City of New York. No question was made as to the validity of the ordinances except as applied to the interstate business of the Adams Express Co. The court held that such application was in violation of the Interstate Commerce clause of the Constitution and said (p. 34):

"We conclude that the complainant was entitled to an injunction restraining the enforcement of the ordinances in question against the company, with respect to the conduct of its Interstate business, and its wagons and drivers employed in Interstate Commerce."

Injunctions were allowed against the enforcement of state regulations in the following cases hereinabove cited:

McNeill v. Southern Railway Co., 202 U. S., 543.

Mississippi R. R. Commission v. Illinois Central R. R. Co., 203 U. S., 335.

Herndon v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S., 135.

CONCLUSION.

We respectfully submit that for the foregoing reasons the judgment below should be reversed and that it should be adjudged that the ordinance in question is invalid as applied to the business of plaintiff in error.

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No. ~~207~~. 28

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CLERK

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1913.

**THE SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY,**

Plaintiff in Error.

versus

THE CITY OF COVINGTON, et al,

Defendants in Error.

In Error to the Court of Appeals of the State of Kentucky.

Reply Brief for Plaintiff in Error.

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Supreme Court of the United States.
OCTOBER TERM, 1913.

*THE SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY,*

No. 227.

vs.

Plaintiff in Error,

THE CITY OF COVINGTON, et al,

Defendants in Error.

In Error to the Court of Appeals of the State of Kentucky.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

THE FACTS.

It is alleged in the petition and proven by uncontradicted testimony, that it is impossible for the company to operate enough cars at the rush hours to comply with the ordinance in question; that it is now operating all the cars which it can get through Cincinnati with the only facilities which it has or is able to get, and that it would require the operation of half as many more cars during

the rush hour as are now operated in that period to comply with the terms of the ordinance.

On pages 24 and 25 of the brief for the City it is assumed that the evidence only shows that the additional number of cars could not be run *on schedule*. We submit that this is a misconception of the testimony on the subject, which is as follows:

(Page 36):

“Q. Mr. Green, I will ask you to state whether in your judgment, from your experience and observation of the handling of the street car traffic over the route which you have described, whether it would be possible for your company to get any more cars over that route between the rush hours which you have described in the evening than you now send over that route?

A. Well, now during the rush hours we have our cars drop back a little from the schedule.

Q. Answer the question yes or no and then make your explanation.

A. You want to know whether any more cars could be put through there.

Q. Under the conditions as they exist.

A. No, to get through the schedule they couldn't.

Q. I mean in the rush hours.

A. (No answer.)

Q. Let me re-state that question. State whether it would be possible for the company to put any more cars through Cincinnati over the route which—have mentioned in the rush hours, than the Company now does and has been?

A. No, sir, we put as many through there now as we can.”

It is evident from this testimony that what the witness meant was that the company could not operate any more

cars over the route in question during the rush hour even if more were scheduled, and that even now it is unable to operate them as fast as they are scheduled.

On cross-examination as to this point the City Solicitor brought out the evidence even more clearly as follows:

(Pages 43-44):

"Q. In answering a question on direct examination you qualified your opinion with reference to the practicability of operating cars by stating that you could not operate them on schedule, please state to what extent the cars would be delayed by operating the number of cars you estimate would be required to comply with this ordinance?

A. I couldn't exactly estimate it, but the delay would be as much time as it would require to get that many cars around the fountain; as it is now we have a line of cars waiting to get around the square from five to six in the evening from 5:15 to 6:10 the cars are waiting there continuously to get around."

And on further cross-examination the witness said:

(Page 48):

"A. Traffic has continued to increase ever since I was Inspector and we have continued to increase the number of cars until we have reached the point where we can't get around the fountain with any more than we are now using.

Q. Isn't it a fact that you haven't any more cars?

A. The fact is that we can't get any more around the fountain during the rush hour.

Q. That is the sole reason you don't operate more cars?

A. Yes, sir.

Q. You say the street cars operate around this loop during the rush hour?

A. Yes, sir.

Q. And the total number of cars operated is 66?

A. Yes, sir.

Q. Is it a fact that some of these cars make more than one trip during the hour?

A. Yes, sir."

And on re-direct examination (pages 48-49):

"Q. You have just stated that the sole reason for the condition at the rush hour is due to the fact that you can't get any more cars around your route in Cincinnati than you are doing now?

A. Yes, sir.

Q. I will ask you to state if you could get any more cars around there, have you got the cars?

A. We are using our entire equipment at the present time.

Q. Is that true since June of last year?

A. Yes, sir.

Q. I will ask you to state please how many new trips or how many additional cars between Covington and Cincinnati that run over the streets of Covington were put on during the rush hours at any time within the last year?

A. 13 trips.

Q. Between what hours?

A. Five and six o'clock in the evening.

Q. They weren't just local between Covington and Cincinnati?

A. No, sir."

On page 55 the President of the Company said:

"You couldn't put through Cincinnati today enough cars, in my judgment if we had a clear

track, to carry the people, simply as required by that ordinance, within the time of the rush hours, when those people want to go home."

And on page 65:

"And owing to the fact that those people all want to come home within forty-five or fifty minutes; you couldn't get enough cars under this ordinance, to handle these people in that time under any condition."

This evidence is uncontradicted. If, as a matter of fact, the company had failed to operate as many cars as could be operated over the route in question it would have been easy for the City of Covington to show the fact and its failure to offer any evidence on that point shows the claim of the company in that regard to be true.

The testimony on behalf of the company that it is using to the full the franchise rights which it has in Cincinnati and that it has been unable to obtain any additional rights which would improve the situation is also undisputed.

We submit, therefore that the legal questions before the court must be discussed upon the assumption that it is impossible for the company to comply with the terms of the ordinance in the respect mentioned.

Counsel for the City suggests on page 24, of his brief, that as the company operates 68 Newport cars over the track on Walnut Street between Fourth and Fifth Streets, it could prevent congestion of the Covington cars by taking off the Newport cars. But he overlooks the fact that this one block on Walnut Street is only a part of the Cincinnati route and that there are points of congestion at many other places on the line, notably going west on Fifth Street, referred to in the foregoing

evidence as "going around the fountain." The block on Walnut Street, where the Newport cars operate, is not referred to in the evidence as a special point of congestion.

Moreover the company is also bound to operate cars from Newport as well as from Covington and it does not appear how it could continue that operation if the simple suggestion of counsel on the other side were carried out of "eliminating" the Newport cars from Walnut Street.

Counsel calls attention to the fact that the lowest schedule on any of the Covington lines is five minutes during the evening rush hour, but he fails to refer in that connection to the fact that the lines all operate necessarily over the same route in Cincinnati and that taking them together their schedule is such that 81 cars go through Cincinnati in the course of the hour, a schedule of considerably less than a minute.

II.

REGULATION OF INTERSTATE COMMERCE.

Counsel for the City claims that we have failed to distinguish between the proper exercise of the police powers of the state and cases which go beyond that exercise.

On the contrary our contention in our brief, commencing on page 31, is that this ordinance considered as a police regulation is an unlawful burden on interstate commerce, because it is oppressive and unreasonable.

The cases cited by counsel for the City do not militate against our contention.

In the case of *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S., 628, the court upheld a statute of New York prohibiting the use of stoves or

furnaces inside railway trains. Exception was made in the case of roads not more than fifty miles in length, also in case of accident or emergency and in cases where the cars were standing still; and a period of about a year was given to the railroads within which to comply with the law. It was not claimed in that case that the railroad could not comply with the ordinance, or that it was unreasonable or oppressive. The principal claim seems to have been that as applied to interstate trains it was a direct regulation of interstate commerce and therefore void.

On this contention the court ruled against the railroad.

Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S., 285, was a case in which a statute of Ohio required railway companies to cause three, each way, of its regular trains carrying passengers, if so many are run daily, to stop at a station, city or village containing over three thousand inhabitants.

The contention of the Railway Company is stated as follows in the opinion of the court on page 298:

"That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is according to the argument made before us, of no consequence whatever; for, it is said, a state regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the *te* enactment."

The court declined to take that view and held that the law was valid.

The court said on page 301:

“As the cases above cited show, and as appears from other cases, the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the state to protect the public interests or promote the public convenience.”

Also on page 305:

“The Ohio statute does not interfere at all with the management of the defendant’s trains outside of the State, nor does it apply to all its trains coming into the State. It relates only to the stopping of a given number of its trains within the State at certain points, and then only long enough to receive and let off passengers. It so manifestly subserves the public convenience, and is in itself so just and reasonable, as wholly to preclude the idea that it was, as the Louisiana statute (*Hall v. DeCuir*) was declared to be, a direct burden upon interstate commerce, or a direct interference with its freedom.”

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Illinois*, 177 U. S., 514, the court held that a statute of Illinois requiring all regular passenger trains to stop at county seats was an unlawful interference with interstate commerce because unreasonable. The court classified the cases on railroad regulation showing that such regulations as were reasonable had been upheld, while those which were unreasonable had been declared invalid.

In other cases cited in our main brief (pages 35-36) this court has held invalid state regulations requiring the stoppage of interstate trains, where this court

deemed them to be unreasonable under all the circumstances.

In *Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U. S., 453, this court upheld the "full crew" statute of the State of Arkansas. It was not claimed in that case that the Railroad was unable to comply with the law, or that a compliance therewith would be confiscatory. The Railroad Company merely claimed that the regulation was unnecessary and useless expense. The court said (p. 466):

"Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view."

The case of *Missouri Pacific Railway Co. v. Kansas*, 216 U. S., 262, cited by counsel for the City has been discussed in our main brief. (Page 16.)

The evidence in this case leads to the conclusion that the main purpose of this ordinance was to regulate the facilities to be afforded interstate travel at the rush hours. The court below said (Rec., pp. 114-115):

"Covington and Newport are on the South side of the Ohio river opposite Cincinnati. Newport is separated from Covington by the Licking river. The two cities have a population of something over 75,000. The Newport cars pass through Covington in going to and from Cincinnati. In addition to this there are Latonia, Ludlow, South Covington and several smaller places near by the cars from which pass through Covington. A large part of the male population in these cities work in Cincinnati.

The result is that in the morning hours when the workers are going out to work, and in the evening hours when they are returning from work, there is great congestion on the cars by reason of which the passengers are subjected to dangers and are sometimes delayed in getting to and from their work, and are made more or less uncomfortable during the journey. Especially is this true of ladies on the very crowded cars. *The ordinance was enacted to remedy this situation.*" [Italics ours.]

It would be hard to imagine a more direct and intentional regulation of interstate commerce.

Taking Effect In Thirty Days.

The brief of the City Solicitor and the opinion of the court below, seem to assume that in order to comply with the ordinance the company would be required to obtain additional franchise rights in Cincinnati, or get additional cars, or both, yet the ordinance, by its terms, was to take effect within thirty days. As we have seen in our main brief this, of itself, is so arbitrary and unfair as to properly subject the ordinance to condemnation. (pp. 30-31.)

The Decisions of State Courts.

Counsel for the City cite the following decisions of State courts, in none of which the question of interference with interstate commerce was involved.

New Jersey Railway Company v. Jersey City, 75 N. J. L., 349, was a case in which the ordinance of Jersey City under consideration was as follows:

"Sec. 1. That all corporations running trolley cars in this city, be and they are hereby re-

quired between the hours of 5:30 and 7:00 o'clock in the evening, to run from their terminals at the Pennsylvania and Erie Stations, a sufficient number of cars to provide with a seat every passenger from whom a fare is demanded.

Sec. 2. That said companies shall run a sufficient number of cars from the said trolley terminals at the Pennsylvania Ferry and the Erie Ferry, during the hours of 5:30 to 7:00 p. m., that persons desiring transportation thereon shall not be kept waiting longer than five minutes.

Sec. 3. Any violation of any provision of this ordinance shall render the company violating the same liable to a fine or penalty of \$50.00 for each offense."

It is to be observed in the beginning that the scope of this ordinance is not so broad as that in the case at bar, for, as the court said, the duty imposed thereby "relates to the number of cars that are to be started from the terminal."

No evidence was offered to show that the ordinance was an unreasonable requirement at the Erie terminal.

The court said with reference to the Pennsylvania terminal (p. 353),

"We are satisfied from the evidence that the prosecutor might, with proper effort, dispatch from this terminal during the rush hours in question, a considerably greater number of cars than it does at present."

The court also said (p. 354):

"Upon the whole, we cannot say that the requirements of the ordinance with respect to the dispatch of cars from the Pennsylvania terminal are either impossible of performance or so

difficult of performance as to render the ordinance oppressive."

In other words, it was not shown in that case as it is in the case at bar, that the company could not operate a greater number of cars at the place specified at the hour mentioned in the ordinance. The facts being different, we submit that the case is plainly inapplicable here.

However, it seems to us that that case turned largely upon a question of procedure under the practice in New Jersey. The question was raised on a writ of certiorari to the Supreme Court of New Jersey to test the validity of the ordinance.

In that proceeding the Street Railway Company was the prosecutor. The court said:

"If an ordinance may operate reasonably in some instances or circumstances, and unreasonably in others, it is not wholly void, and should not be set aside *in toto*."

An examination of the authorities cited by the court on that proposition shows that this statement was made with reference to the use of that particular remedy.

One of the cases cited was *Hamblet v. Asbury Park*, 32 Vroom, 61 N. J. L., 502, where the court had under consideration on certiorari the validity of an ordinance imposing a license fee on various occupations and it held that such a writ could not be maintained by a non-resident solicitor on the ground that said license fee was demanded of him. The court said on pages 504-505:

"The remedy by certiorari to annul this ordinance is not, in my opinion, open to the prosecutor in advance of any action taken against him under its provisions.

In reaching this conclusion, I am aware that the opposite view receives countenance from

some, and confirmation from other cases decided in this court. A review, however, of our domestic law of certiorari, from the time when we departed from the rule of English practice, will show that, after some vacillation, the correct rule was finally declared by our court of last resort in the case of *Pennsylvania Railroad Co. v. Jersey City*, 18 Vroom, 286. In that case the railroad sought, upon certiorari and before conviction or suit, to set aside a city ordinance that exposed it (under one view of the law) to a penalty if it obstructed certain streets for a period longer than three minutes. In denying the availability of certiorari to such a state of affairs, Chief Justice Beasley said that, upon the assumption that the ordinance was illegal as to the prosecutor, 'such a vice would not render it generally but only specially inefficacious, that is, the court would not vacate the entire ordinance, but merely refuse to put it in effect in that part of it that was thus unreasonable. If the complaint of the plaintiff in error (prosecutor) be well founded therein, the remedy is to object to the validity of the ordinance in the penal suit for the obstruction of the streets referred to, and in that mode place before the court the limited question whether the ordinance be not a nullity in respect to that particular locality.' "

See also to the same effect the later case of *Rosecrans v. Eatontown*, 51 Vroom, 80 N. J. L., 227.

In *Cain v. Bayonne*, 52 Vroom, 81 N. J. L., 15, the court held that under the writ of certiorari it "could do nothing less than set aside the entire ordinance."

On the other hand where a writ of certiorari is taken to the Supreme Court of that State to review a conviction of an offender against the terms of an ordinance, the court has power to pass upon the reasonableness of

the operation of the ordinance in the particular case. *Erie Railroad Co., Prosecutor, v. Mayor and Aldermen of Jersey City*, 54 Vroom, 83 N. J. L., 92.

In a case such as that last mentioned, the writ was said to "bring up a conviction." In the other cases the writ was said to "bring up the ordinance."

In the Jersey City case, therefore, cited by opposing counsel, the court could not, under the procedure, do otherwise than dismiss the writ. It could not hold the ordinance invalid *in toto* because there was no claim that it operated unreasonably as to the Erie station. As the ordinance could not be held void *in toto*, the writ had to be dismissed.

We submit that that case does not throw any light on the case at bar. It is not the rule, especially in the Federal courts, that when a complainant seeks by a bill in equity to enjoin the enforcement of an ordinance as to such complainant, or under particular circumstances, as an interference with interstate commerce, it must show that the ordinance is void *in toto* and under all circumstances.

In *Adams Express Co. v. The City of New York*, 232 U. S., 14, this court held that the complainant, Adams Express Co., was entitled to an injunction restraining the enforcement of a certain ordinance of the City of New York as against it, with respect to its conduct of its interstate business. It did not hold the ordinance in question to be void *in toto*, or under all circumstances, or as against any other complainant.

In the case of *Houston & Texas Railroad Co. v. Mayes*, 201 U. S., 321, which came to this court on proceedings in error to review a conviction in a State court, there was no showing that under the particular circumstances, or as to the particular defendant, the law in question had operated unreasonably. The court held the law void as

an unreasonable interference with interstate commerce, because it made certain arbitrary requirements as to car supply and did not make express exceptions of certain contingencies, such as inability to furnish the cars, sudden congestion of traffic, etc.

As we have shown, this aspect of the Mayes case was referred to in *Southern Railway Co. v. Commonwealth*, 107 Va., 771, where the Virginia court held that this court declared the statute an unreasonable burden upon interstate commerce and invalid, so far as interstate shipments were concerned, for the reason that the statute was "likely" to do great injustice to the railroads because of its arbitrary requirement.

It was accordingly held by the Virginia court that the Virginia regulation under consideration was not saved by the fact that it gave the Commission a right to suspend the operation of the objectionable rule whenever justice demanded such action. The court said (p. 777):

"The constitutional validity of a law is to be tested not by what has been done under it, but by what may be done."

In the case of *Louisville & Nashville Railroad Co. v. Eubank*, 184 U. S., 27, referred to in our main brief, the court said on page 35:

"That the railroad commission is authorized upon application to permit the company to charge less for a longer than for a shorter distance, is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal."

In *Eubank v. Richmond*, 226 U. S., 137, the court in holding an ordinance to be invalid tested it "by its extreme possibilities."

It is further to be noted that the case of *New Jersey Railway Co. v. Jersey City*, *supra*, did not involve the question of interstate commerce. A State might leave to its own courts and juries the determination in specific cases of the reasonableness or unreasonableness of a municipal ordinance not applicable to interstate commerce. But a State may not pass a law, or a municipality an ordinance, affecting interstate commerce which "may operate reasonably in some instances or circumstances and unreasonably in others," and relegate the interstate carrier to the local courts for determination in specific cases whether it was reasonable to enforce the statute or ordinance.

A distinction must be drawn between (a) cases where an ordinance or law is attacked on the mere ground that it is arbitrary and unreasonable, and (b) cases where a State law or regulation or municipal ordinance is attacked as an interference with interstate commerce.

In the first class of cases there is a presumption of the reasonableness and the consequent validity of the regulation and the burden is on the attacking party to show clearly that it is unreasonable or oppressive. That was the question and the ruling in *Railway Company v. Jersey City*.

In the second class of cases, the primary question is whether such law or regulation is a burden upon interstate commerce, and its reasonableness is to be considered from that standpoint. If it actually operates on interstate commerce it is beyond the power of the State and invalid, unless such operation is only incidental and entirely reasonable. A State statute or regulation which operates upon interstate commerce is on the defensive,

so to speak, and to be upheld it must be entirely and affirmatively reasonable.

Hence this court has never upheld a State law or regulation operating upon interstate commerce which "may operate reasonably in some instances or circumstances and unreasonably in others."

To illustrate the difference between the reasonableness of a regulation in a general sense and its reasonableness from the special standpoint of the power of a State when dealing with interstate commerce, we cite the following:

In *Atlantic Coast Line v. Riverside Mills*, 219 U. S., 186, the court had under consideration the validity of the Carmack amendment, which made any common carrier receiving property for transportation from a point in one state to a point on another line in another state, conclusively liable for any loss, damage or injury to such property caused by it, or by any connecting carrier. It was claimed against the validity of this act, that it was arbitrary and unreasonable and therefore beyond the power of Congress. The court overruled this contention and held that the act was valid and within the power of Congress under the interstate commerce clause of the constitution.

In *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S., 481, the act was again sustained and it was held by the court that when goods consigned to a carrier for shipment to a point on another line in another state, were lost, the presumption arose that they had been lost by reason of negligence of the carrier or its agents and that the burden of proof was upon the initial carrier to explain and to show that the loss was not due to any act for which the carrier or a connecting carrier would be liable.

Yet in *Central of Georgia v. Murphy*, 196 U. S., 194, a similar law of the state of Georgia, which was not so rigorous as the Carmack amendment, was held, when applied to interstate commerce, to be "not a reasonable regulation in aid of interstate commerce but a direct and immediate burden upon it."

A given regulation therefore may be reasonable and valid when applied by Congress to interstate commerce or by a state to *intra*-state commerce, and yet unreasonable and burdensome when applied by a state to interstate commerce.

It seems to us that the following cases cited by counsel for the City have no application to the case at bar.

Mayor, etc., v. Dry Dock, etc., Co., 133 N. Y., 104, was an action to recover a penalty of \$100 against a street railway company for the violation of an ordinance of the City of New York requiring the several street surface railroads to operate their cars "as frequently as public convenience may require and not less than one car every twenty minutes between the hours of 12 midnight and six o'clock A. M.," etc.

The particular violation charged in the complaint was the failure of defendant to run its cars on its Avenue D branch every twenty minutes during the ordinance hours on the 11th day of July, 1890.

Section 2 of the railroad company's charter provided:

"2. Said railroad shall be constructed on the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the City of New York may from time to time by ordinance prescribe."

The court held that as the charter of the company expressly subjected it to regulations by the common council of the City of New York it could not object to such regulations, unless they were unreasonable. It did not pass upon the reasonableness of the ordinance in question, but held that the court below, in finding it to be reasonable, had rejected certain relevant evidence and on that ground reversed the judgment against the company.

In *Chicago v. Chicago City Railway Co.*, 222 Illinois, 560, the ordinance required certain things to be done relative to the temperature and ventilation of the cars and that there should be "furnished a sufficient number of cars on each separate line to carry passengers comfortably and without overcrowding and which cars shall be run upon a proper and reasonable time schedule."

A bill in equity was filed on behalf of two of the street railway companies of Chicago, to enjoin the City from enforcing the ordinance and from prosecuting numerous cases which had already been brought against the companies to enforce the penalties provided by the ordinance.

The court held, on the authority of numerous Illinois decisions, that the bill in equity would not lie to enjoin the prosecution of such criminal proceedings, even for the purpose of preventing multiplicity of suits.

The case seems to have turned entirely upon the appropriateness of the remedy, and it does not appear that the court passed on the question of the reasonableness of the ordinance.

The rule laid down in that case, as to the appropriateness of the remedy, is not the rule in Kentucky.

In *South Covington & Cincinnati Street Ry. Co. v. Berry*, 93 Ky., 43, it is said on page 45:

"If the ordinance was invalid, then to prevent a multiplicity of prosecutions and such

consequences as would necessarily result from its enforcement, the company had a right to ask preventive equitable relief."

Nor is it the rule in the Federal Court. The cases on this point have been collected in our main brief (page 51).

We refer the court, in addition, to the case of *Dobbins v. Los Angeles*, 195 U. S., 223, 241.

III.

THE CONTRACT.

Counsel cites cases on the proposition that the contract of the City of Covington as to the frequency with which cars should be operated to Cincinnati is ineffectual to protect the company at this time, because Covington could not divest itself by contract of its police power.

We have examined the cases cited and none of them support the claim that a municipality may not make a binding contract with reference to the frequency with which cars shall be operated over specified routes.

We have discussed this question fully in our main brief but we desire to say in reply that in our view the regulation of interstate travel between Covington and Cincinnati is not within the police power of the City of Covington and a contract on that subject is therefore not open to the objection stated, even if the doctrine were as claimed by counsel for the City.

All of which is respectfully submitted.

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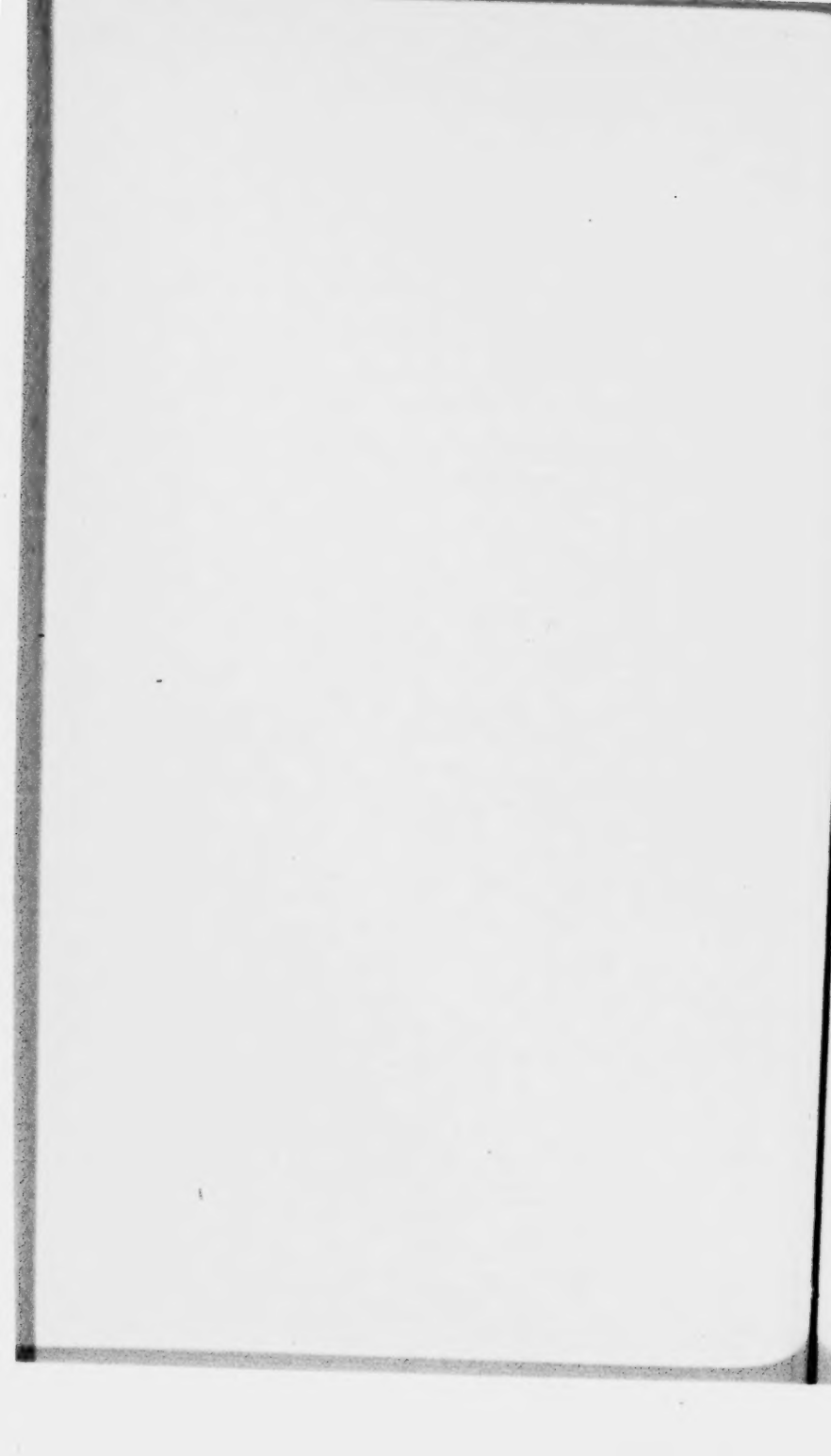
SUPREME COURT of the UNITED STATES

SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY, a Kentucky corporation,
Plaintiff in Error

vs.

THE CITY OF COVINGTON, a Municipal
Corporation of the second class, et al.
Defendant in Error

FREDERICK W. SCHMITZ
Solicitor for Defendant



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Supreme Court of the United States

SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY, a Kentucky corporation,
Plaintiff in Error

vs.

THE CITY OF COVINGTON, a Municipal
Corporation of the second class, Et al,
Defendant in Error

STATEMENT OF THE CASE.

The plaintiff in error, the South Covington and Cincinnati Street Railway Company, was incorporated under an Act of the General Assembly of Kentucky, passed January 25, 1876. Section 3 of said Act provides as follows:

"The business of said corporation shall be the construction, operation and management of street railways in the City of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to, and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way . . . and it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof."

In October, 1892, the City of Covington, from which plaintiff in error had obtained certain franchises for the operation of lines of street railway within the city, claiming that the rights of way and privileges then enjoyed by the plaintiff company had expired, proceeded to sell them anew, but finally agreed to postpone action and grant said company the right to continue the operation of its lines in the City of Covington for a period of twenty years, upon certain terms and conditions contained in an ordinance passed October 7, 1892, and accepted by the company.

In said ordinance it was provided in part as follows:

"Sec. 1. Be it ordained by the Common Council of the City of Covington, that, in consideration of the South Covington and Cincinnati Street Railway Company, within twenty days after the acceptance of this ordinance, reducing and maintaining during the term of the contract period herein provided for a reduced cash fare of five cents and no more, for one continuous ride upon its cars from any point on its lines in the City of Covington, as the said corporate limits now are or may hereafter be extended, to Fourth Street or to Fountain Square, in the City of Cincinnati, and from Fourth Street or Fountain Square in the City of Cincinnati to any point upon its lines in the City of Covington, as its corporate limits now are or may hereafter be extended, it being understood that the said company shall carry passengers to Fountain Square, in the said City of Cincinnati, only in case it shall continue to operate its lines to said Fountain Square, otherwise to Fourth Street in Cincinnati; the transferring from one car or line to another car or line shall be held to be a continuous ride." . . .

" It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company."

" and said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6:00 a. m. to 5:00 p. m., and not to exceed five minutes from 5:00 p. m. to 8:00 p. m., and not to exceed ten minutes from 8:00 p. m. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart."

The aforesaid ordinance appears in full on the record, pp. 78 to 85.

On October 24, 1910, the General Council of the City of Covington enacted the ordinance now complained of and set out in full on pages 3-4 of the record. This ordinance undertakes to provide for the "health, comfort and safety of passengers on street cars operated within the City of Covington, by requiring:

1. The number to be carried on the inside of a car to be limited to one-third over and above the number of passengers provided with seats.
2. A rail or barrier on back platform to insure "reasonably sufficient space for ingress and egress of passengers."
3. A rail or barrier on front platform to enable the motorman "to properly and conveniently operate the mechanism controlling the said car, without interfering or crowding from other persons on said platform."

4. Cleaning, ventilating, and fumigating of all cars.

5. A temperature of not less than 50 degrees Fahrenheit to be maintained.

6. Sufficient cars be "run within the corporate limits of the City of Covington at all times to reasonably accommodate the public within the limits of this ordinance, as to the number of passengers to be carried."

7. A fine of \$5.00 to \$50.00 for the violation of Sections 2 and 6, and of \$50.00 to \$100.00 for the violation of any other section.

This ordinance is set out in full on pages 111-113 of the record herein.

Its provisions are attacked on the following grounds:

First: That the ordinance is an unlawful interference with, and regulation of, interstate commerce; in violation of Article I, Section 8, of the Constitution of the United States.

Second: That it deprives the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment.

Third: That it is an impairment of the obligation of the contract between plaintiff and the City of Covington, in violation of Article I, Section 10, of the Constitution.

The foregoing grounds of objections were urged before the Kenton Circuit Court at Covington, Kentucky, wherein the original attack was made and where the ordinance was upheld by Judge M. L. Harbeson, whose opinion is appended as part of this brief.

On appeal to the Court of Appeals of Kentucky, the judgment of the Kenton Circuit Court was affirmed, the opinion of the Court appearing on pages 111 to 116 of this record; also 146 Ky., page 592. A writ of error was allowed to this court with an order granting a temporary injunction, pending the hearing. (Record, p. 120.)

BRIEF OF THE ARGUMENT.

I.

AS TO IMPAIRMENT OF CONTRACT OBLIGATION.

The provision in the contract between the City of Covington and the Street Railway Company, whereby the latter agreed to run its Cincinnati cars at intervals not to exceed seven minutes from 6:00 a. m. to 5:00 p. m.; five minutes from 5:00 p. m. to 8:00 p. m.; ten minutes from 8:00 p. m. to midnight, and to run the cars on all other lines not to exceed ten minutes apart, did not constitute a contract which deprived the city of the right, under its police power, to provide for reasonable accommodation of the public by requiring the cars to be run at shorter intervals.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S., 653.

Tacoma vs. Boutelle, 61 Wash., 434.

Minneapolis Railway Co. vs. Beckwith, 129 U. S., 26.

Chicago Electric R. R. Co. vs. Illinois, 200 U. S., 561.

C. B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

L. & N. R. R. Co. vs. Kentucky, 161 U. S., 699.

Georgia R. R. Co. vs. Smith, 128 U. S., 174.

Mugler vs. Kansas, 123 U. S., 638.

Crescent City vs. L. S. L. & L. H. Co., 111 U. S., 746.

S. C. & C. H. Ry. Co. vs. Berry, 98 Ky., 43.

Lexington Turnpike Co. vs. Croztan, 98 Ky., 739.

Kaw Valley Drainage District vs. Kansas City T. R. Co., 87 Kas., 272.

Missouri P. R. Co. vs. Kansas, 216 U. S., 261.

Atlantic Coast Line R. R. Co. vs. N.C.C.C.,
206 U. S., 1.

II.

NO BURDEN UPON INTERSTATE COMMERCE.

A

Even if the performance of the duty upon the street railway company of furnishing adequate facilities or accommodation to the public within the corporate limits of the City of Covington required the company, as an alternative measure, accord like treatment to its interstate passengers, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed.

Missouri P. R. Co. vs. Kansas, 216 U. S., 261.

Atlantic Coast Line R. Co. vs. Wharton, 207 U. S., 328.

New York, N. H. & H. R. Co. vs. New York, 165 U. S., 628.

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285.

B

It was the duty of the Street Car Company, as a common carrier, to furnish sufficient cars for the reasonable accommodation of the public, and it could not be said as a matter of law, that such duty was performed by a service resulting in a daily occurrence of overcrowded cars, so as to make a regulation by the City of Covington, limiting the number of passengers to be carried within a car to one-third as many more as its seating capacity, and requiring the operation of sufficient cars to reasonably accommodate the public, subject to such limitation, so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States.

Missouri P. R. Co. vs. Kansas, 216 U. S., 262.

People vs. St. Louis A. & T. H. R. Co., 176 U. S., 512.

C

An ordinance of a city regulating a common carrier to perform its duty of furnishing sufficient cars for the reasonable accommodation of the public is not unreasonable because of difficulties within the control of the carrier.

Missouri P. R. Co. vs. Kansas, 216 U. S., 261.

North Jersey R. Co. vs. Jersey City, 75 N. J. L., 349.

Minneapolis Street Ry. Co. vs. City of Minneapolis, 189 Fed., 445.

Tacoma vs. Boutelle, 61 Wash., 434.

Mayor vs. T. T. E. B. Electric Co., 133 N. Y., 108.

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S., 453.

Nellis on Street Railways, vol. 1, 2nd ed., Section 143.

III

NO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A

A provision of an ordinance, leaving it to the court or jury to determine what is "reasonable," does not make the enactment invalid.

Waters Pierce Oil Co. vs. Texas, 212 U. S., 85.

Standard Oil Co. vs. United States, 221 U. S., 1.

A penalty of \$5.00 to \$100.00 for violating the provisions of an ordinance requiring reasonable accommodation and equipment from a street car company, is not so arbitrary and oppressive as to deprive the company of its property without due process of law.

Ex Parte Young, 209 U. S., 123.

Missouri T. R. Co. vs. Tucker, 230 U. S., 340.

Mayor vs. T. T. E. B., Etc., Co., 133 N. Y., 108.

ARGUMENT

The caption of the ordinance complained of in this case shows that its purpose was "to further regulate the operation of street cars and street car lines in the City of Covington, and providing for the health, comfort, and safety of the passengers using said cars, and providing penalties for the violation thereof."

The provisions of its various sections show a careful adherence to the purposes set out in the caption.

Section 1 seeks to prevent overcrowding inside of a car.

Section 2 seeks to prevent the overcrowding upon the rear platform of a car, so as to permit ready ingress and egress of the passengers.

Section 6 seeks to provide for sufficient cars in order that the public may have reasonable accommodation without overcrowding.

Section 3 seeks to protect the motorman on the front platform in the matter of operating the mechanism of the car.

Section 4 provides for the cleaning, ventilating and fumigating of the cars.

Section 5 provides for a minimum of temperature within cars. And,

Section 7, as well as Section 2, provide for penalties running from \$5.00 to \$100.00 for violation of the various provisions.

So we see that each one of the first six sections is plainly directed to one or the other of the purposes set out in the caption of the ordinance, namely, to the health, comfort, and safety of the passengers.

The plaintiff in error now complains that the ordinance is an unlawful interference with interstate commerce; and that the enforcement of it by way of

penalties will deprive them of their property, without due process of law; and that it amounts to impairment of the obligation of the contract rights held by them under their franchise.

In answering these three objections we believe it will serve the purpose of clearness and brevity to take up the third one first, and we contend:

I

AS TO IMPAIRMENT OF CONTRACT OBLIGATION.

That, in the first place, the plaintiff in error, the South Covington and Cincinnati Street Railway Company, had no contract whatever giving it the exclusive right to determine how many cars it may place at the public's disposal, or how many people it may carry on its cars. There is no such reservation in the ordinance of 1892. It is claimed by the company, however, that the language of the ordinance of 1892, that:

"Said company . . . shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6:00 a. m. to 5:00 p. m., and not to exceed five minutes from 5:00 p. m. to 8:00 p. m., and not to exceed ten minutes from 8:00 p. m. to midnight, and all other lines of cars to be operated not to exceed ten minutes apart,"

amounts to a contract protecting it against any reduction of intervals between its cars during the period covered by said ordinance, namely, October, 1892, to October, 1912, no matter what the conditions or exigencies may be.

We submit that the foregoing contention rests upon a forced and most unreasonable construction of said provision. It is clear that the intention was to keep the company from making the intervals between cars

greater than those prescribed, but giving the company the privilege of operating the cars at shorter intervals, and leaving it open for further regulation by the city whenever it deemed the public needs to require a shortening of such intervals.

It was held in the case of *City of Tacoma vs. Boutelle*, 61 Wash., 434, 112 p. 661, that the expression that cars may be operated at intervals not to exceed a certain length of time, is nothing more than an expression of the minimum service regarded by the city as being sufficient for the then demands of the city, in the territory covered by the franchise.

In the case of *Cedar Rapids Gas Light Company vs. Cedar Rapids*, 223 U. S., 653, it was held that a provision in an ordinance granting a renewal of its franchise to a gas company, that, in consideration of the privileges granted it shall furnish gas at a price not to exceed \$1.80 per 1,000 cubic feet, and 20 cents per 1,000 cubic feet for discount to consumers paying before the tenth of each month after consumption, is not a contract by the city that the prices shall be kept high enough to allow a discount for prompt payment, the agreement being that of the company alone, and subject to the city's power to regulate rates.

And in the second place, it is well settled that a municipality cannot contract away its police power.

Missouri P. R. Co. vs. Kansas, 216 U. S., 262.

Minneapolis R.Co. vs. Beckwith, 129 U.S., 26.

Atlantic Coast Line R. R. Co. vs. North Carolina, C. C. 206 U. S., 1.

Chicago, etc. R.R.Co. vs. Illinois, 200 U.S., 561.

C.B. & Q. R.R. Co. vs. Nebraska, 170 U.S., 57.

L. & N. R. R. Co. vs. Kentucky, 161 U. S., 699.

Georgia R. R. Co. vs. Smith, 128 U. S., 174.

Mugler vs. Kansas, 123 U. S., 638.

Crescent City vs. L. S. L. & S. H. Co., 111 U. S., 746.

S. C. & C. Street Ry. Co. vs. Berry, 98 Ky., 43.

Lexington Turnpike Co. vs. Crozton, 98 Ky., 739.

Tacoma vs. Boutelle, 61 Wash., 434.

Kaw Valley Drainage District vs. Kansas City T. R. Co., 87 Kas., 272; 123 p. 991.

In the Missouri case (216 U. S., 261), the railroad company claimed that, under its charter, it had a contract right to regulate the time and manner of operating its trains, and hence was not subject to an order of the State Railroad Commission, requiring the company to operate a passenger (instead of a mixed train—passenger and freight) on its line.

The order was objected to by the railroad company on the identical grounds advanced in the case at bar.

Referring to the case of Atlantic Coast Line R. Co. vs. North Carolina Corp Coms., 206 U. S., 1, the Court said:

“Also in the same case, restating a principle previously often announced, it was held (p. 20) that railway property was susceptible of private ownership, and that rights in and to such property securely rested under the constitutional guaranties by which all private property was protected. Pointing out that there was no incompatibility between the two, the truism

was reannounced that the right of private ownership was not abridged by subjecting the enjoyment of that right to the power of reasonable regulation, and that such governmental power could not in truth be said to be curtailed because it could not be exerted arbitrarily and unreasonably without impinging on the enduring guaranties by which the Constitution protected property rights.

"The Coast Line Case was concerned with the exertion of state power over a matter of state concern. But the same doctrines had been often previously expounded in reference to the power of the United States in dealing with a matter subject to the control of that government. Moreover, in the cases referred to, as the power of the two governments operated in different orbits, it was always recognized that there was no conflict between them, although it was constantly to be observed that, resulting from the paramount operation of the Constitution of the United States, even the lawful powers of a state could not be exerted so as to directly burden interstate commerce.

"Coming to apply the principles just stated to the order in question, and considering it generically, it is obvious that it exerted a lawful state power. Its commands were directed to a railroad corporation which, although chartered by other states, was also chartered by Kansas, and concerned the movement of a train on a branch road wholly within the state, which had been built under the authority of a Kansas charter, although the road was being operated by the Missouri Pacific under lease. The act commanded to be done was simply that a passenger train serv-

ice be operated over the branch line within the state of Kansas. Unless, then, for some reason, not manifested in the order, intrinsically considered, it must be treated as such an *arbitrary and unreasonable exercise of power as to cause it to be, in effect, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, as operating a direct burden upon interstate commerce*, it is clear that, within the doctrine previously stated, no error was committed in directing compliance with the order."

II

THE ORDINANCE IS NOT AN UNLAWFUL INTERFERENCE WITH, AND REGULATION OF, INTERSTATE COMMERCE.

This contention of the plaintiff in error is presented in a two-fold aspect. It is claimed that the order is void as a direct burden, upon interstate commerce; and that it is void because it is an unreasonable and oppressive police regulation.

In support of the first proposition, plaintiff in error relies principally upon the cases of:

Hall vs. DeCuir, 95 U. S., 485.

Covington and Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204.

Houston & T. R. Co. vs. Massachusetts, 201 U. S., 321.

McNeal vs. Southern R. Co., 202 U. S., 543.
Mississippi Railroad Commission vs. Illinois R. R. Co., 203 U. S., 325.

Atlantic Coast Line R. Co. vs. Wharton, 207 U. S., 328.

Herndon vs. C. R. I. & P. R. Co., 218 U. S., 135.

Yazoo and Mississippi Valley R. Co. vs. Greenwood Grocery Co., 227 U. S., 1.

An examination of these cases discloses that counsel for plaintiff in error failed to distinguish between the proper exercise of the police power of a state, and cases which go beyond that exercise. For instance, the case of Herndon vs. C. R. I. & P. R. Co., 218 U. S., 135, is cited as an authority against the validity of the ordinance in the case at bar, because the ordinance, it is claimed, as a whole, relates to the facilities of travel. The Court in that case, however, laid down the principle that a state may require the stoppage of interstate trains in so far as that may be necessary to furnish ample facilities for the convenience and accommodation of the people of the state, but could not impose that burden in the exercise of its police power upon any or all interstate trains, if ample facilities had already been provided for.

The above cases, and similar cases relied upon by the plaintiff in error, may be distinguished from the case at bar in that it is one thing to require instruments employed in interstate commerce to be subjected to a use within a state at all events, and quite another to require that sufficient instruments to answer the needs of the public within the state be furnished, even though such instruments be employed in interstate commerce at the same time.

In the Minnesota rate cases, 230 U. S., 352, we find all of these cases cited by plaintiff in error classified under the principle that the states have no power or right to prescribe the rates to be charged for transportation from one state to another, or to subject the operation of cars in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection.

The Court, after giving numerous other illustrations of the proposition that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive, turns to that class of cases wherein action by the states in creating and regulating local facilities is upheld, even though interstate commerce may incidentally or indirectly be involved. We read:

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities; to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of the people, although interstate commerce may, incidentally or indirectly, be involved. Our

system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose, and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

For illustration of the foregoing, the Court cites a number of cases holding that "legislation of the states, safeguarding life and property, and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands, and is not opposed to Federal legislation."

New York, N. H. & H. R. Co. vs. New York, 165 U. S., 628.

Lake Shore and M. S. R. Co. vs. Ohio, 173 U. S., 285.

Missouri P. R. Co. vs. Kansas, 216 U. S., 261.

In the first of these cases (165 U. S., 628) involving a statute forbidding heating of cars by stoves, it was held, that cars employed in interstate commerce, are not exempt, in the absence of national legislation, covering the subject, from the operation of a state law forbidding under penalties the heating of passenger cars in that state by stoves or furnaces kept inside of the cars or suspended therefrom. Further, that possible inconveniences (growing out of conflicting state regulation) cannot affect the question of power in each state to make such regulations for the safety of passengers on interstate trains as in its judgment is appropriate and effective.

In the second of these cases (173 U. S., 285) involving a statute of Ohio, requiring each railroad company whose road is operated within the state to cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village containing over 3,000 inhabitants, long enough to receive and let off passengers, it was held that such legislation is for the public convenience, and is not a regulation of interstate commerce and unconstitutional when applied to the trains of a corporation of the state engaged in such commerce.

The third of these cases, *Missouri P. R. Co. vs. Kansas*, 216 U. S., 261, practically answers every contention made in the case at bar.

To the claim that the order of the State of Kansas, requiring the running of a passenger train within the state line, constituted a direct burden upon interstate commerce, the Court responded:

"To support this proposition, it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the

argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce, and beyond the control of the State of Kansas. But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter, therefore, left the road for which it provided, subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the Constitution upon the government of the United States.

"The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line, where there were no terminal facilities, but in a disguised

form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within a state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere corn field, and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the state line, but twenty miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on

interstate commerce would be imposed. *Atlantic Coast Line R. Co. vs. Wharton*, 207 U. S., 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121."

Testing the case at bar with the principles embraced in the foregoing quotation, we may say that the fact that the plaintiff in error, under some agreement with the Cincinnati, Newport and Covington Street Railway Company, ran its cars across the state line to Cincinnati, did not deprive the State of Kentucky of its right to impose reasonable police regulation to be observed within its own borders.

Here, too, the claim is made that the company has no facilities at the state line to enable it to carry out the provisions of the ordinance as to the number of passengers or supply of cars, and that it would be impracticable to do so, because the passengers coming from Cincinnati to Covington, would not get off the crowded cars and exchange them for cars with sufficient room! (Rec. p. 55.) Further, that it would be an impossibility to run more cars around the Fountain Square loop in Cincinnati, owing to congestion of traffic at that point, and the company's unsuccessful effort to get better facilities from the Cincinnati Traction Company, in command of the situation on the Ohio side. For these reasons the ordinance is claimed to be unreasonable, arbitrary and oppressive.

A similar contention was advanced in the *Missouri Pacific R. R. Co.* case, *supra.*, namely, that the order in that case was unreasonable and oppressive because the passenger train could not be run without pecuniary loss, and because there were no terminal facilities at the state line, and no occasion for the termination of the transit. The Court said in part:

"But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considera-

tions are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road is then the question to be considered.

"It may not be doubted that the road, by virtue of the charter under which the branch was built, was obliged to carry passengers and freight, and therefore, as long as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers. In substance, this was all the order commanded, since it was confined to directing that the road put on a train for passenger service. True it is that the road was carrying passengers in a mixed train; that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. But when the

necessary result of the contention is thus defined, its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort, and safety between travel on a passenger service train and travel on a mixed train; that is, a train composed of freight cars with a passenger car attached, as to cause any exertion of legislative authority for the public welfare, based on a distinction between the two, to be repugnant to the Constitution of the United States. The demonstration as to the want of foundation for such a contention might well be left to the consensus of opinion of mankind to the contrary."

THE EVIDENCE.

When the general council of the City of Covington enacted the ordinance complained of, it was confronted by the following conditions. The largest cars of the plaintiff company seated thirty-two people (Rec. p. 61) and there was standing room between the seats on the inside of the car for twenty-one more, provided no allowance was made for the passage of the conductor collecting fares, or for persons coming in or going out. (Rec. p. 89-93.) The average load of cars was sixty-five to seventy (Rec. p. 99), but eighty-five passengers to a car at one time was a daily occurrence (Rec. p. 100) and they would have as high as one hundred passengers at one time (Rec. p. 100).

According to the testimony of J. P. Ernst, President of the plaintiff company, the motormen and conductors would not refuse to stop or accept any more passengers "unless the car is so absolutely jammed that it is self-evident that nobody can get on, but the rule is not to pass anybody without stopping." (Rec. p. 60.)

From the above it will be seen that if a car carried seventy people, it meant that every seat and all available standing room inside of the car was taken,

and that seventeen persons were crowding the front and rear platform. If eighty-five persons, a daily occurrence, were on the car, it meant that every seat and all available standing room on the inside of the car was taken, and that thirty-two persons were crowded on the front and rear platforms.

The objections advanced on behalf of plaintiff in error are centered upon those sections of the ordinance which limit the number of passengers to be carried on the inside of a car to its seating capacity and one-third of that number additional, and require that the company furnish sufficient cars at all times to reasonably accommodate the public.

Testimony was introduced by the plaintiff in error, which was intended to show, that in order to have enough cars to meet the requirements of the ordinance with reference to the limitation upon its carrying capacity, it would be necessary to run half as many more as the company was then operating, and that it would then be impossible to operate that many cars around the loop formed by Fountain Square, Cincinnati, and at the same time, maintain the schedule, especially during the rush hours of morning and evening. (Rec. pp. 36-38-43.)

President Ernst testified that attempts had been made to obtain the consent of the Cincinnati Traction Company to use Fourth Street (being one square south of Fountain Square, and nearer to the bridge) so as to eliminate contact with the traffic around Fountain Square, but that the negotiations had fallen through. (Rec. p. 53).

But, on the other hand, the evidence shows that the Cincinnati, Covington and Newport Street Railway Company, in addition to operating sixty-six Covington cars over the track between Fourth and

Fifth Streets on Walnut Street at the same time operates sixty-eight Newport cars over the same track, thereby helping to create the very congestion which it is claimed will prevent the operation of more cars. (Rec. pp. 32-47-49.) If it took but thirty-three more cars on the Covington line in order to meet the requirements of the ordinance (and the company chose to observe these requirements even after leaving, or before reaching, Covington), then the elimination of the sixty-eight Newport cars over Walnut Street, between Fourth and Fifth Streets, or at least thirty-three of these cars, would greatly relieve the congestion of traffic at that point, and this matter is entirely under the control of plaintiff in error.

Furthermore, the claim that the operation of a sufficient number of cars around Fountain Square would be an impossibility, is hardly sustained by the statement of the Superintendent of Tracks, that the increased number of cars could not be run on schedule. Again, there was no showing by plaintiff in error why the negotiations with the Cincinnati Traction Company for Fourth Street, fell through. This is simply a business matter, and by making the requisite sacrifice the use of Fourth Street could no doubt have been obtained. Again, inasmuch as a great many people of Covington going over to Cincinnati during the morning, and coming back during the rush hours of the evening, work in the bottoms of Cincinnati, that is in the district lying between Fourth Street and the Suspension Bridge (Rec. p. 91), there was nothing to prevent some of the Covington cars from being run over Third Street. Again, the lowest schedule on any of the Covington lines using the Fountain Square loop, is five minutes during the evening rush hour, and the highest schedule seven minutes; while during the morning rush the lowest schedule is six minutes, and the highest schedule is seven and one-half minutes. (Rec. p. 103.)

It can easily be seen therefore, that the claims of impossibility represent nothing but conclusions on the part of the witnesses and are not justified by the testimony which is offered to sustain them.

In answer to the claim that the ordinance is unreasonable, arbitrary and impracticable, the Court of Appeals of Kentucky said:

"Lastly it is insisted that the ordinance is unreasonable, arbitrary and impracticable, Covington and Newport are on the south side of the Ohio river opposite Cincinnati. Newport is separated from Covington by the Licking River. The two cities have a population of something over 75,000. The Newport cars pass through Covington in going to and from Cincinnati. In addition to this there are Latonia, Ludlow, South Covington and several smaller places near by the cars from which pass through Covington. A large part of the male population in these cities work in Cincinnati. The result is that in the morning hours when the workers are going out to work, and in the evening hours when they are returning from work, there is great congestion on the cars by reason of which the passengers are subjected to dangers and are sometimes delayed in getting to and from their work, and are made more or less uncomfortable during the journey. Especially is this true of ladies on the very crowded cars. The ordinance was enacted to remedy this situation. It is insisted that the cars are capable of carrying without danger to person or health a greater number of passengers than permitted by the ordinance; that some cars have a greater capacity than others in the matter of standing passengers on the rear platform; that the ordinance limits the number of passengers

permitted to stand within the cars but places no limit on the number of passengers which may be permitted to stand on the back platform, and that the company will be without power to prevent passengers from going into the car at pleasure, as the conductor will be engaged in taking up his fares; that the ordinance provides for no fine against the passengers violating its provisions; that the company cannot prevent people from getting on the cars in greater numbers than the ordinance permits; that the requirement of fumigation of each car once a week is unnecessary and unreasonable, and that owing to the facilities which the company has in Cincinnati, it will be impracticable for it to run cars at less intervals than it now runs.

"We are unable to see that the ordinance is invalid for any of these reasons. It is a reasonable requirement that the number of passengers which shall be permitted to ride within the car shall not be more than one-third greater than the seating capacity of the car. When a greater number of people are permitted to be in a car, there is certainly more or less tendency to create disorders and to bring about conditions not favorable to the health or comfort of the passengers. If the conductor is engaged in taking up his fares, some arrangement can be made to keep passengers out of the car, or an extra man may be employed for this purpose. The company has charge of its car, and it can refuse to take on other passengers, and if a passenger is allowed to get on the rear platform when there is no room in the car, he may be prevented from entering the car. If the company cannot provide the necessary accommodations for the traveling public on the cars it has, it must

provide itself with more cars. It is a public servant created for a public purpose, and while it enjoys its franchise, it must discharge the duties imposed upon it by the franchise. If it cannot run its cars singly, and carry the crowd, it must run trailers or it must use larger cars. The cars it uses were adequate when the population of these cities was half what it is now, but if larger cars are required by the increased population, then larger cars must be provided or the smaller cars must be run as trailers.

"We do not see that Section 4 or 5 are arbitrary or unreasonable. As shown by modern science a large percentage of disease is communicated by germs, and when many people are carried in cars these germs are liable to find lodgment there. We cannot say that the fumigation of cars once a week is an unreasonable requirement or that it is unreasonable to require the cars to be kept at a temperature not less than 50 Fahrenheit.

"The rule at common law is that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried. This rule of the common law is to be read into Section 6 of the ordinance. It is the duty of the defendant under this ordinance to run and operate cars in sufficient numbers at all times to reasonably accommodate the public as there provided, in so far as in the exercise of ordinary care it has reason to anticipate that such an amount of accommodation will be necessary. When section 6 is thus read it is not unreasonable or arbitrary or impracticable of enforcement. The company will not be responsible for not furnishing a sufficient accommodation to ac-

commode a crowd which it has not reason in the exercise of ordinary care to anticipate. But it should exercise ordinary care to provide cars that will reasonably accommodate the passengers which may reasonably be anticipated."

A similar ordinance was upheld in the case of North Jersey Railway Company vs. Jersey City, 75 N. J. L., 349; 67 Atl., 1072.

In that case the Court reviewed an ordinance which provided as follows:

Sec. 1. That all corporations running trolley cars in this city, be and they are hereby required between the hours of 5:30 and 7:00 o'clock in the evening, to run from their terminals at the Pennsylvania and Erie Stations, a sufficient number of cars to provide with a seat every passenger from whom a fare is demanded.

Sec. 2. That said company shall run a sufficient number of cars over the said trolley terminals at the Pennsylvania Ferry and the Erie Ferry, during the hours of 5:30 and 7:00 p. m., that persons desiring transportation thereon shall not be kept waiting longer than five minutes.

Sec. 3. Any violation of any provision of this ordinance shall render the company violating the same liable to a fine or penalty of \$50.00 for each offense.

It was conceded in that case by the Street Car Company that the regulation of street railway companies in their use and operation of their public vehicles of conveyance, with due regard to the comfort, safety, and health of the passengers transported, and to the convenience of the passengers desiring transportation, came fairly within the police power of the city. But

it was contended that the ordinance was unreasonable **BECAUSE IT WAS IMPOSSIBLE TO COMPLY WITH IT.**

The Court approached the examination of the fact under the principle that the court will not interfere, unless it is clearly shown that the ordinance, either upon the face of its provisions, or by reason of its operation in the circumstances, under which it is to take effect, is unreasonable or oppressive, quoting:

Trenton Horse R. R. Co. vs. Trenton, 53 N. J. L., 132-140.

Traction Co. vs. Elizabeth, 58 N. J. L., 619-622; 34 Atl., 146.

Ivins vs. Trenton, 68 N. J. L., 501-505; 53 Atl., 202.

There was no claim made that the ordinance was unreasonable upon the face of it. It was contended, however, that:

"Upon the face of the present ordinance its unreasonableness is not demonstrated, nor do counsel so contend. The contention that the number of persons desiring to take passage upon the cars of the prosecutor at the Pennsylvania Terminal, within the hours mentioned in the ordinance (what is known as the "rush" hours), and the conditions of ordinary street traffic upon the streets by which the cars approach and leave the terminus, are such as to render the duty imposed upon the prosecutor by the ordinance impossible of performance. The evidence shows that the present prosecutor and the Jersey City, Hoboken & Patterson Street Railway Company, are the only corporations running the trolley cars in Jersey City from the terminals at the Pennsylvania and Erie Railroad Stations, and it is to these companies alone that the ordinance applies. It is to be observed at the outset that no

attempt has been made to show that the ordinance is impossible of observance at the Erie terminal, or is otherwise unreasonable so far as that terminal is concerned. To this extent, therefore, we find the ordinance reasonable. Practically the entire evidence and the whole stress of the prosecutor's argument are directed to the condition of affairs existing at the terminus of the street car lines at the Pennsylvania Railroad ferry. Nine lines of street cars use this terminus, and for their accommodation there are seven tracks in the car shed. The cars all come into the terminal by way of York Street, and on these streets for two blocks they are confined to a single track. The headway between cars on the different car lines during the rush hours varies between two and twelve minutes, and a car of one or another of the various lines leaves the Pennsylvania terminal at intervals approximating forty seconds, during the afternoon rush hours. The testimony renders it clear that during these hours a large proportion of the street cars leave this terminal unduly crowded, and that for this reason a considerable number of would-be passengers are obliged to walk instead of using the cars. The practical difficulties, from the standpoint of the street railway companies, are enhanced by the circumstances that the incoming cars are occasionally detained by blockades in the street. There is also occasional congestion of traffic along the outgoing track on Exchange Place and Montgomery Street, but this does not so directly tend to interfere with the performance of the duty imposed by the ordinance, since that duty relates to the number of cars that are to be started from the terminal. The principal difficulty at the terminal results

from the large number of ferry boats that reach Jersey City at that point from New York, between 5:30 and 7:00 p. m., crowded with passengers, who, for the most part, desire to make their way homeward by the trolley cars. The boats arrive somewhat irregularly, and it is, no doubt, practically quite difficult to handle all the passengers with comfort upon the outgoing cars. Nevertheless, the resulting situation is such as to render it proper that the traction companies should be required to do all that reasonably lies within their power to furnish a sufficient number of cars to comfortably accommodate the arriving passengers and prevent their being detained unduly at the terminal.

"We are satisfied from the evidence that the prosecutor might, with proper effort, dispatch from this terminal during the rush hours in question, a considerably greater number of cars than it does at present. How many more could be dispatched we are unable from the evidence to determine, nor can it be determined without a practical test. But it is significant that no effort has as yet been made by the prosecutor to comply with the requirements of the ordinance; and no practical test has been attempted.

"No doubt, under any schedule or system of running the cars, interruptions may occasionally be caused by extraordinary blockades in the street, or by other circumstances over which the traction company has no control. The ordinance, however, should be given a reasonable interpretation, and it is not to be supposed that the company would be held liable for the results that might occasionally be produced by causes beyond its control.

"Upon the whole, we cannot say that the requirements of the ordinance with respect to the dispatch of cars from the Pennsylvania terminal are either impossible of performance or so difficult of performance as to render the ordinance oppressive. The operation of the ordinance, therefore, is not wholly unreasonable. Exceptional circumstances that may render its performance impossible in particular instances, may be availed of by way of defense, if action is brought for recovery of the penalty that the ordinance prescribes. If an ordinance may operate reasonably in some instances or circumstances, and unreasonably in others, it is not wholly void, and should not be set aside *in toto*.

Penn. R. R. Co. vs. Jersey City, 47 N. J. L., 286.

Nicoulin vs. Lowery, 49 N. J. L., 391-394; 8 Atl. 513; Trenton Horse R. Co. vs. Trenton, 53 N. J. L., 132-140; 20 Atl. 1076; 11 L. R. A., 410.

Gaslight Co. vs. Rahway, 58 N. J. L., 510; 34 Atl., 3.

Hamblett vs. Asbury Park, 61 N. J. L., 502-504; 39 Atl., 1022.

Cent. R. R. Co. vs. Elizabeth, 70 N. J. L., 578-581; 57 Atl., 404.

"The ordinance before us not appearing at all to be unreasonable in its application to the Erie terminal, and not under all circumstances unreasonable in its application to the Pennsylvania terminal, it should be permitted to stand to the end that it may be enforced except in particular cases where it may be made to appear that the circumstances render the operation of its provisions unreasonable or oppressive.

"The writ of certiorari will be dismissed, with costs."

To the same effect:

Minneapolis St. R. Co. vs. City of Minneapolis, 189 Fed., 445.

Tacoma vs. Boutelle, 61 Wash., 434; Mayor, etc., vs. T. T. E. B. & B. R. R. Co., 133 N. Y., 108; City of Chicago vs. Chicago St. R. R. Co., 222 Illinois, page 560.

Nellis on Street Railways, vol. 1, 2nd ed., Section 143.

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S., 453.

III

NO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is further contended upon behalf of plaintiff in error that the ordinance is violative of the Federal constitution, because under the provisions of Section 6 it is left to a jury to say what amounts to reasonable accommodation, and that this makes the ordinance void for uncertainty. The plaintiff in error cites the case of L. & N. R. R. Co. vs. Commonwealth, 99 Ky., page 132, in support of its contention as to uncertainty. As against this authority we will cite the latest decision of the Court of Appeals of Kentucky, namely, the decision which was rendered in the case now before this court, in which the validity of this ordinance was upheld; and we submit that the Court did not look upon its position in construing this very ordinance as being in conflict with its decision in the L. & N. R. R. Co. case, which involved a question of reasonable rates.

Similar provisions to that contained in this ordinance were upheld in the case of Waters-Pierce Oil Company vs. Texas, 212 U. S., 85.

The Court held that due process of law is not denied a corporation convicted of violating certain anti-trust

laws of the State of Texas, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which "tend" or are "reasonably calculated" to bring about such result.

It was also held in that case that the amount of fines for the violation of state legislation is within the police power of the state, subject only to the limitation that such fines must not be so grossly excessive as to amount to a deprivation of property without due process of law.

In the case of *Standard Oil Company of New Jersey vs. United States*, 221 U. S., 1, it was contended that the Sherman Act was so indefinite that it was not susceptible of being enforced by the courts. The first section of that Act provides:

"Every contract, combination, in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments in the discretion of the court."

The Supreme Court disposes of that contention in the following language:

"So far as the arguments proceed upon the conception that, in view of the generality of the statute, it is not susceptible of being enforced by the courts because it can not be carried out without judicial exertion of legislative power, they are clearly unsound. The

statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions, therefore, insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether, in a given case, particular acts come within a generic-statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority, and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that, which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

The Supreme Court in this opinion decided that the word "reasonably" should be read into this statute. The ordinance here involved contains the word "reasonably" and we think is no more indefinite in any respect than is the section of the Sherman Act above quoted.

Lastly, it is claimed that the penalties provided for in the ordinance of the City of Covington are so arbitrary and oppressive as to amount to deprivation

of property without due process of law, but no authorities are cited in which like or similar penalties were ever condemned.

In the case of *Mayor vs. T. T. E. B., etc., Co.*, 133 N. Y., 108, a penalty of \$100.00 for violation of similar provisions of a city ordinance was approved.

In the case of *Ex parte Young*, 209 U. S., 123, relied on by plaintiff in error, the fines were considered so enormous and the imprisonment so severe as to amount to intimidation of the corporation.

In the case of *Missouri T. R. Co. vs. Tucker*, 230 U.S., 340, a fine of \$500.00, and attorney's fee, in case of overcharge for any shipment, were deemed to be so arbitrary and oppressive as to amount to deprivation of property without due process of law.

In the case at bar, however, the penalties for violation of Sections 2 and 6, pertaining to the number of passengers, are \$5.00 to \$50.00; and for the violation of Sections 1, 3, 4, 5, they are \$50.00 to \$100.00; and we submit that there is nothing unreasonable about these amounts. It may seriously be doubted whether these penalties could have been made any lower without destroying, or at least greatly impairing the usefulness of the ordinance.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Appeals of Kentucky should be affirmed.

FREDERICK W. SCHMITZ

Solicitor for City of Covington.

APPENDIX

Opinion of His Honor M. L. Harbeson,
Judge Common Law and Equity
Division Kenton Circuit Court,
Upholding the Ordinance.

KENTON CIRCUIT COURT

August 7, 1911.

SOUTH COVINGTON & CINCINNATI STREET
RAILWAY COMPANY VS. CITY OF COV-
INGTON.

OPINION.

On October 24, 1910, the General Council of the City
of Covington enacted the following ordinance:

COUNCIL ORDINANCE No. 4872

AN ORDINANCE TO FURTHER REGULATE
THE OPERATION OF STREET CARS AND
STREET CAR LINES IN THE CITY OF COV-
INGTON, AND PROVIDING FOR THE
HEALTH, COMFORT, AND SAFETY OF PAS-
SENGERS USING SAID CARS, AND PROVID-
ING PENALTIES FOR THE VIOLATION
THEREOF.

BE IT ORDAINED BY THE GENERAL COUNCIL OF THE CITY
OF COVINGTON:

Section 1. That it shall be unlawful for any person,
corporation, or company owning or operating street
cars for the carriage of passengers for hire in or through
or over the public streets of the City of Covington, to
permit more than one-third greater in number of pas-
sengers to ride or to be transported within such cars over
and above the number for which seats are provided in
the same, provided that this section shall not apply to or

be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

Section 2. No such person, company, or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such cars, and no one shall be permitted to stand in such place so provided for such ingress and egress, but the same shall at all times be kept clear, free, and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor, and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the Police Court of said city.

Section 3. No such person, company, or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform; said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from other persons upon said platform, if any; and no person or passenger shall ever be permitted to stand by or remain within the enclosure thus provided for the motorman.

Section 4. It shall be the duty of every such person, company, or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the Board of Health of the City of Covington shall have power and authority to prescribe rea-

sonable rules providing for the cleanliness, ventilation, and fumigation of such cars, and all such companies or corporations shall comply with such reasonable rules.

Section 5 — The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

Section 6 — It is hereby made the duty of every company, person, or corporation operating street cars and the street car lines within the corporate limits of the City of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the General Council of the City of Covington may, by resolution, at any time, direct the number of cars operated upon any line or route to be increased to a sufficient number to so accommodate the public, if there is failure in that respect. Any such person, company, or corporation failing or refusing to run or operate sufficient cars as by this section provided, shall be subject to the penalties provided by Section 2 hereof.

Section 7 — Any person, company, or corporation violating either of the provisions of this ordinance shall be guilty of a misdemeanor, and shall be punished by fine of not less than fifty dollars nor more than one hundred dollars for each offense, recoverable in the Police Court of the City of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such city and others exercising police power to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction. And the Chief of Police is hereby directed to assign at least one police officer to the special enforcement of this ordinance. It shall be the duty of

such officer to examine and observe street cars in operation, and to make arrest and cause proper prosecutions to be started against offenders violating this ordinance.

Section 8 — Nothing contained in this ordinance shall be held or construed to be or to effect a renewal of an extension or enlargement of the right of any person, company, or corporation to use or occupy the streets and highways of the City of Covington for street railway purposes.

Section 9 — This ordinance shall take effect thirty days from and after its passage and approval by the Mayor.

On November 22, 1910, this action was instituted by the plaintiff, who is engaged in operating lines of street railway in the City of Covington, to enjoin prosecutions and the infliction of fines upon it for violations of this ordinance, upon the ground that the ordinance is void.

Without regard to the order of their enumeration in the petition, the plaintiff pleads that the ordinance is void for the following reasons:

First — Because the City Council of the City of Covington was without power, under its charter, to enact the ordinance.

Second — Because the ordinance embraces more subjects than one.

Third — That the ordinance impairs the obligations of a contract entered into between the plaintiff and the defendant on October 7, 1892.

Fourth — That the ordinance is an unlawful and unreasonable interference with, and regulation of, interstate commerce, and in violation of Article I, Section 10, of the Constitution of the United States.

Fifth — That the ordinance deprives the plaintiff of its property without due process of law, in violation of

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth — That the ordinance is unreasonable.

At the outset it is contended by the defendant that the remedy by injunction does not lie, but that the remedy is by writ of prohibition, and that the plaintiff's petition should be dismissed upon that ground. Upon the question of the proper remedy the court considered the Kentucky authorities upon the question on the motion herein for a temporary injunction, and there concluded that where the purpose of the action is to protect property or civil rights by preventing repeated prosecutions or fines for the violation of an ordinance alleged to be invalid, injunction is the proper remedy if the right to it exists. The authorities are collected in the opinion on the motion for the temporary injunction, and no others are cited on the final submission, and the court adheres to the ruling there made.

We come, then, to consider the objections to the validity of the ordinance.

THE AUTHORITY OF THE CITY TO ENACT THE ORDINANCE.

Of course the authority of the city to enact any ordinance rests not alone upon whether the municipality has authority to legislate upon a certain subject, but upon whether the legislation is within the power granted to legislate upon that subject; hence it is difficult to consider the power of the city to enact an ordinance dealing with a subject without at the same time dealing with the question as to whether or not the ordinance in its provisions is within the power granted, for although the city may have authority to legislate upon the regulation of

street car companies, and the operation of its lines and cars, the ordinance is still open to objection if it be an unreasonable regulation.

Section 3058 of the Kentucky Statutes, Sub-section 2, gives to the city the power to license, tax, and regulate "street railroads, companies, or corporations," together with many other businesses, many of which are private businesses in the sense that they do not perform any public service.

Sub-section 25 of Section 3058, with reference to powers granted provides:

"To pass all such ordinances, not inconsistent with the provisions of this act or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties, and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

In the opinion of the court the specific authority of the city to regulate street railroads and other businesses mentioned in Sub-section 2, does not add to or subtract from that conferred by Subsection 25 of the same section. In other words, the Legislature by Sub-section 2, did not confer upon the city the power to regulate and control street railways and the businesses therein mentioned, independent of the question of whether the regulation or control affected the peace, good government, health and welfare of the city, for the simple reason that the Legislature itself had not the power to regulate or control those businesses, or any business, independent of the considerations of public peace, good government, health, and welfare, and it could not delegate what it did not possess. Besides, Sub-section 25 clearly recognizes

that it had theretofore delegated, in specific instances and restricted to particular businesses, the exercise of the public power, and for that reason, when it granted the general power, it provided that any enumeration of subjects and matters therein to be regulated should not be construed as a limitation upon the general power. So it simply comes to the question as to whether or not the things ordained in the ordinance fall within the police power specifically and generally delegated by the two subsections of the section of the statute mentioned.

It is contended that any ordinance or act which has not for its purpose the protection of the safety, health, and morals of the public is not within the police power, and that the crowding of street cars does not injuriously affect either the health, safety, or morals of the public. The court is of the opinion that, with regard to common carriers and their regulation, the police power extends to such reasonable regulations as have for their purpose the comfort and convenience and general welfare of the public, whether the regulation directly affects the safety, health, or morals of the public or not.

Cyc., Vol. 31, page 902.

Cyc., Vol. 8, page 874.

Am. & Eng. Ency. of Law (First Edition),
Vol. 18, pages 752 and 760.

McQuillin, Municipal Ordinances, Sections
429, 430, 433, and 473.

Abbott on Municipal Corporations, Section
133.

In *Munn vs. Ill.*, 94 U. S., 113, it was laid down that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in its use, and must, to the extent of that

interest, submit to be controlled by the public for the common good as long as he maintains the use. He may withdraw his grant by discontinuing the use, and that in the exercise of this control it has been customary in the United States from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and other similar employments, and in so doing to fix a maximum charge to be made for services rendered, accommodations rendered, and articles sold, and in that case the statute regulating warehouses was upheld. If the sections of the Kentucky Statutes relating to railroads are examined, numerous provisions relative to maintaining waiting rooms, closets, etc., and providing for ticket offices to be kept open for thirty minutes before train time, and for employees wearing uniforms, for the announcement of trains, and for the posting of tariffs and for posting of delayed trains, together with numerous other regulations which do not relate to safety, morals, or health, but to the convenience and comfort of the traveling public, and these provisions have been recognized and upheld as valid.

L. & N. R. R. vs. Commonwealth, 97 Ky., 207; (17 Ky. L. R., 116).

L. & N. R. R. vs. Commonwealth, 102 Ky., 300; (19 Ky. L. R., 1462).

L. & N. R. R. vs. Commonwealth, 103 Ky., 605; (20 Ky. L. R., 366).

The same is true with reference to statutes governing insurance companies and regulating their contracts, and in any number of cases where other corporations are regulated by the statutes. In *Gladson vs. State of Minnesota*, 166 U. S. 435, it is said:

"A railroad corporation created by a state is for all purposes of local self-government a domestic concern, even when its road connects, as most railroads do, with railroads in other states; and the state which created the corporation may make all needful regulations of a police character for the government of the corporation while operating its road in that jurisdiction. It may prescribe the location of the place of construction of the road, the rate of speed at which trains shall run, and the places at which they shall stop, and make any other reasonable regulation for their management in order to secure the objects of the corporation, and the safety, good order, convenience, and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state."

Ordinances to prevent overcrowding of street cars have been enacted in Pittsburgh, Minneapolis, and Detroit and in Boston, prohibiting the company from permitting persons to stand between seats upon the open cars. These cases do not appear to have been as yet passed upon by the courts of last resort in the respective jurisdictions, but copies of the opinions of the lower courts deciding and passing upon the validity of the ordinances have been furnished the court by counsel upon both sides, and so far as the power of the municipality to enact an ordinance prohibiting the overcrowding of street cars, the courts in each case decided that it is within the police power of the municipality, if the regulation is reasonable.

Even if the regulation was required to directly affect the safety, health, or morals of the public, the court holds that overcrowding of the cars does so, but the court is of the opinion that that is not the limitation of the police

power. In the case of Pittsburgh Railways Company vs. City of Pittsburgh, the Court said:

"When a reasonable number of people are in a car, it is not only uncomfortable but indecent for additional persons to crowd into the car until men, women, and children are wedged together in a mass."

In the brief of counsel for the plaintiff it is said:

"Whatever be the power of the state as a sovereignty to impose requirements for the public convenience upon public service corporations, the power does not belong to municipalities unless expressly granted."

The Court assumes from this that counsel means that, under a general grant of police powers to a municipality, that the exercise of the power is in some way or manner restricted to less than that which the state has itself. No authority is cited to support the contention, and in the authorities which the Court has examined, it was uniformly held that, within the jurisdiction of the municipality, the only limitation upon the powers of the municipality to exercise it was that the ordinance must not be in conflict with the constitution, statutes of the state, and not repugnant to any public policy of the state.

It is not suggested wherein this ordinance is in conflict with any statute of the state, or contravenes public policy, and the question as to whether it is in conflict with the constitution or not will be considered under another head. The Court is, therefore, of the opinion that an ordinance which has for its purpose the prevention of overcrowding of street cars, and which prevents the carrier from permitting them to be overcrowded, is clearly within the police power of the city. Whether the ordinance in its provisions is reasonable, is another and different question.

THE TITLE OF THE ORDINANCE.

Section 3059 of the Kentucky Statutes provides:

"No ordinance shall embrace more than one subject, and that shall be expressed in the title."

The title of the ordinance is:

AN ORDINANCE TO FURTHER REGULATE THE OPERATION OF STREET CARS AND STREET CAR LINES IN THE CITY OF COVINGTON, AND PROVIDING FOR THE HEALTH, COMFORT, AND SAFETY OF PASSENGERS USING SAID CARS, AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

In *Silva vs. City of Newport*, 27 Ky. L. R., 212, the court held that the ordinance provided for the letting of three separate and distinct franchises or subjects and was, therefore, contrary to this provision.

This ordinance does not relate to two subjects. The clause relative to providing for the health, comfort, and safety of the passengers using said cars is not a different subject from the regulation of the street cars and street car lines, but is the object to be obtained by those regulations, and is fully expressed in the title. It relates to but one connected thing.

Burnside vs. Lincoln County Court, 86 Ky., 423; 9 Ky. L. R., 634; 24 Ky. L. R., 516.

Lowry vs. City of Lexington.

In *McGlone vs. Womack*, 111 S. W., 688, the title of the act was:

"An act to promote the sheep industry, and to provide a tax on dogs." The Court held that the act did not deal with two subjects. The Court said: "But we do

not agree that the title before us relates to two subjects. The subject matter of the act is the promotion of the sheep industry, and this is to be accomplished by a tax on dogs. No other attempt to promote the sheep industry is indicated in any provision in the act taken as a whole. It may be that the title of the act is somewhat awkwardly expressed. What it really means is, that it is an act to promote the sheep industry by providing a tax on dogs, and when thus read all duality disappears."

See *al*, *Eastern Kentucky Coal Lands Company vs. Commonwealth*, 106 S. W., 270.

Brown vs. Moss, 105 S. W., 138.

Brown-Foreman Company vs. Commonwealth, 101 S. W., 321.

Shrader vs. Semonin, 96 S. W., 904.

Commonwealth vs. Reinecke Coal Mining Company, 79 S. W., 286.

A large collection of authorities upon the subject will be found in the note to Section 51 of the Constitution, and the Court has examined quite a number of them, and all of the cases which the Court can find or has examined lead to the conclusion that the title of the ordinance under consideration embraces only one subject, and that is expressed in the title.

IMPAIRMENT OF THE OBLIGATIONS OF THE CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANT OF DATE OCTOBER 7, 1892.

In October, 1892, the City of Covington was contending that certain franchises of the defendant had expired, and was proceeding to advertise and sell the franchises to operate a street railway over streets then occu-

pied, and over which the plaintiff was then operating a line of street railway. The plaintiff was claiming a perpetual franchise in the operation of a line of street railway over these streets, and litigation resulted. On October 7 the city and plaintiff entered into a contract by the terms of which it was agreed that the plaintiff might continue the operation of its lines in the City of Covington over certain streets for a period of twenty years, and the provisions of the contract stipulate the terms and conditions, it being further stipulated that the contract should not affect the rights of either party, but that, in effect, they were to be the same at the expiration of the twenty years as they were when the contract was entered into.

One of the provisions of the contract was as follows:

"Said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 5 p. m. to 8 p. m., and not to exceed ten minutes from 8 p. m. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart."

It is the contention of the plaintiff that the compliance with the ordinance under consideration, by supplying enough cars to reasonably accommodate the public, with the limited number of persons permitted to be carried by each car as fixed in the ordinance, would require the plaintiff to operate cars more frequently than is provided by the provisions of the ordinance or contract of 1892 as the minimum number which it should operate. In other words, the plaintiff construes the ordinance to mean that the city would not require the opera-

tion of more cars than were necessary to comply with the schedule fixed as the minimum, and that whether the company would operate more cars than was required by schedule, in the minimum fixed, is purely a matter of volition to be exercised by the plaintiff, and it is contended that the city by this contract is bound as to the number of cars to be operated during the life of the contract of twenty years, and that as the provisions of the ordinance under consideration, if complied with, would require a greater number to be operated, that it violates the contract obligations of the parties under the contract of 1892.

The Court can not give to language used the construction contended for. The same question arose in the case of *Winchester & Lexington Turnpike Road Company vs. Crozton*, 98 Ky., 739; (17 Ky. L. R., 1299).

In that case the charter or contract fixed the amount of toll to be charged upon the several kinds of stock and vehicles using the turnpike, with a provision that if it failed to pay six per cent on the capital stock the company might raise the tolls so as to make it produce six per cent, and that if it made more than twelve per cent, then the tolls were to be reduced to such an extent as would make it produce only twelve per cent. The Legislature enacted a law prescribing a rate of toll to be charged upon all turnpikes, and it was claimed that it was a violation of their contract. The Court, in construing the provision of the contract relative to the fixed rates, said:

"It is precisely as if in front of the company's charter the state had written: 'I grant you the right to charge certain fixed rates, and these may be increased or diminished within certain limits, according as you make six or twelve per centum per annum on the capital invested. These rates and profits are reasonable, but I go no fur-

ther. I do not say that I shall always regard them as reasonable. I reserve, as I do not barter away the power to provide reasonable rates for the traveling public of the future.' If the state had meant otherwise, it would have said that the rate as fixed herein shall remain unchanged forever; and, to sustain appellant's contention, these important words must be interpolated into the charter; and this is true, not only with reference to the specific rates of toll fixed, but to the specific minimum and maximum of rates of interest as well. The fixing of the tolls and rates of interest allowable was but an expression of the legislative will that such tolls and such rates of interest were, for the time being, reasonable and lawful; and there is no promise, express or implied, that further and future regulations are finally abandoned by the state.

. . . In *Georgia R. R., etc., Company vs. Smith*, 128 U. S., 174, the language of the charter adopted in 1833 was, 'that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles; and five cents per mile for every passenger.' The Supreme Court, by Mr. Justice Fields, upheld the legislative act of 1879, empowering commissions to fix the rates of transportation at less than the maximum of rates authorized by the charter, and, in the course of a thorough review of the question, said: 'It, the charter, contains no stipulation, nor is any implied, as to any future act of the Legislature.

. . . It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the Legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there desig-

nated. We have considered the question without reference to the case of *Commonwealth vs. Covington & Cincinnati Bridge Company*, 14 Ky. L. R., 836, the principles of which are in fact conclusive of this case. That case was reversed by the Supreme Court (154 U. S., 204), because a regulation of the tolls on bridges spanning the Ohio River was held to affect interstate commerce. It was not deemed necessary by that court to discuss the contract features involved, but whether we regard the opinion of this court in that case as an authoritative precedent or merely as an argument, it is the court's latest expression of opinion on the subject involved, and we now approve and follow it.' "

While the court does not construe the provision of the contract with reference to the schedule of the cars, as fixed in the contract, as anything other than an expression as to what the parties deemed reasonable at that time, and is of the opinion that it was never contemplated that that schedule was to remain in force for twenty years, yet, if such had been the intention of the parties, or even if the contract had clearly stated that that schedule should remain in force for twenty years unless the plaintiff at its own volition should change it by operating cars more frequently than was required by it, this express provision would not have had the effect of rendering any subsequent enactment or regulation by the city of the schedule a violation of the contract, because if the subject regulation was a proper exercise of the police power the city could not by contract divest itself of the power to exercise it. While a municipality can not, under the guise of the exercise of the police power, be permitted to violate its contractual obligations, yet, neither will it be permitted to contract away its governmental powers, conferred upon it for the purpose of being

exercised from time to time for the benefit of those governed by it.

Cyc., Vol. 8, pages 974 and 981, and Vol. 28, page 696.

McQuillin, Municipal Ordinances, Section 473.

Abbott on Municipal Corporations, Sections 115 and 116.

Louisville City Railway vs. City of Louisville, 8 Bush, 71.

South Covington & Cincinnati Street Railway Co. vs. Berry, 94 Ky., 47.

Commonwealth vs. Covington & Cincinnati Bridge Company, 14 Ky. L. R., 836.

City of Louisville vs. Wible, 84 Ky., 290.

Commonwealth vs. Douglass, 100 Ky., 120.

Stone vs. State of Mississippi, 101 U. S., 814.

Louisville & Nashville Railroad Company vs. Central Stock Yards Company, 97 S. W., 778.

New Orleans Gas Light Company vs. Louisiana, etc., Company, 115 U. S., 650.

New York, etc., Company vs. Bristol, 151 U. S., 556.

Chicago, etc., Railroad Company vs. State of Nebraska, 170 U. S., 57.

New Orleans Gas Light Company vs. New Orleans D. Company, 197 U. S., 453.

San Antonio Traction Company vs. Altgelt, 200 U. S., 304.

Northern Pacific Railroad Company vs. Minnesota, 200 U. S., 587.

It may be contended that after the decision of the Supreme Court in the case of *Stone vs. State of Mississippi* and *Commonwealth vs. Douglass*, in which it laid down the broad rule that the state could not by contract divest itself of its power, that, in *New Orleans Gas Light Company vs. Louisiana, etc., Company*, it modified it by stating that if the police regulation affected the health, morals, or safety of the public, then all contracts were subject to it, but that it would not go so far as saying that all regulations within the enlarged meaning of the word police power could not by contract be so divested as to prevent its exercise impairing contracts. It is true the court did so state, but it did not by any means limit the cases in which contracts were subject to the exercise of the police power to those affecting the health, morals, and safety of the public, and there is no case that this court has been able to find in which the court has held that contracts of a municipality or state are not subject to police regulations, which have for their purpose the general welfare of the community or the prevention of the discomfort or inconvenience of the members of the community by reason of a public service corporation's failure to provide reasonable accommodation for passengers.

While in the case of *Chicago, Burlington & Quincy Railroad Company vs. Ill.*, 200 U. S., 561, the question of contract was not involved, the appropriation of its property, a bridge, without compensation, was involved, and it was urged that the requirement that it reconstruct the bridge was not required by reason of the health or safety of the public, and was not, therefore, a police regulation. The Court said:

"The learned counsel for the railway company seem to think that the adjudications relating to the police

power of the state to protect the public, the public morals, and the public safety, are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district and make them tillable or fit for cultivation. We do not assent to the view expressed by counsel. We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals, or the public safety. . . . The foundation upon which the power rests is in every case the same. This power, as said in *Carthage vs. Frederick*, 122 N. Y., 268, has always been exercised by municipal corporations 'by making regulations to preserve the order to promote freedom of communication, and facilitate the transaction of business in crowded communities.' "

And in *Bacon vs. Walker*, 204 U. S., 311, the Court said, in speaking of the case just quoted from:

"In that case we rejected the view that the police power can not be exercised for the general well-being of the community." With regard to the claim that the ordinance impairs the obligation of the contract, the Court is of the opinion, first, that there is no contract by which the plaintiff acquired the right to operate its cars under schedule named in the contract of 1892, during the life of the contract, and that the parties did not intend

that the provision as to schedule should continue during the period of the contract, or that it limited or was intended to limit the number of cars or the frequency with which they should be operated during the continuation of the contract, or was intended as any limitation on the power of the city to require them to be operated more frequently if the comfort or convenience of the public reasonably required it. Second, that if such had been the intention and had been so expressed it would be invalid for the reason that the municipality can not by contract divest itself of its power to pass such regulations as have for their purpose the preservation of the public health, safety, or morals, or for the purpose of promoting the substantial benefit or well-being of the public or the comfort and convenience of the public, at least so far as is necessary to require public service corporations to provide reasonable accommodations for the transportation of the public. Third, that the ordinance in question, having for its purpose the prevention of the overcrowding of street cars, is a regulation which may be said to affect both the safety and morals of the public; and, without question, promotes the convenience, comfort, and well-being of the public, and that it is, therefore, valid so far as any objection can be urged to it upon the ground that it impairs a contract.

INTERFERENCE WITH, OR BURDEN UPON, INTERSTATE COMMERCE.

There is a very definite statement in the evidence relative to whether or not the plaintiff is engaged in interstate commerce at all or not. It has no franchise or property except in Kentucky, and has no franchise in Cincinnati to operate over its streets. There is another corporation, called the C. N. & C. Street Railway Com-

pany, or the Covington & Cincinnati Street Railway Company, which, it seems, has rights over certain streets in Cincinnati. The different corporations are said to be under the same management, does not give one any rights in the property or lines of the other, they being distinct corporations. It appears in one place in the evidence that the plaintiff does not operate any cars in Cincinnati, and it further appears that the cars operated on plaintiff's tracks proceed across the bridge and over and upon its streets, without any change in the crew, and return. It does not appear definitely that there is any contract or grant from either of those companies to the plaintiff to operate over their lines. It is uncertain whether under any traffic arrangement the operation of the cars is in some way passed to the other company when it reaches Ohio. It does not appear that such other company has any right or authority to lease its lines in Cincinnati to the plaintiff or others. If it is simply a connecting line, and ceases with the limits of Kentucky, it can hardly be said to be engaged in interstate commerce. The answer puts in issue the question of its being engaged in carrying persons from the State of Kentucky to and into the City of Cincinnati, and the court is not satisfied with the character of evidence introduced that it does so. However, if it did own and operate the line in Cincinnati, this ordinance does not, in the opinion of the court, interfere with interstate commerce, and is not such a burden upon it as is restricted by the federal grant of power to regulate commerce between the states. It is not the purpose of the court to go into a discussion of all the numerous cases decided by the Supreme Court deciding what is, and what is not an interference with, or regulation of, interstate commerce, or what is and what is not such a burden as conflicts with the federal power to regulate

interstate commerce. It is clear that the state, by the grant of power to the Federal Government to regulate commerce between the states, did not divest itself of its public power with reference to the agencies of interstate commerce while within the jurisdiction of the state. The power of the Federal Government to regulate commerce between the states and the police power of the state over the means, instrumentalities, and agencies by which interstate commerce is carried on, both exist within certain limits. It is clear that police regulations which only incidentally affect commerce between the states is not restricted, and police regulations which do affect interstate commerce of such local character as precludes the reasonable probability of Congress enacting any general law applicable, and where it has not enacted any, or has not acted, is not denied to the state. Of course the police regulation can have no effect beyond the jurisdiction of the state. It is inconceivable that it was ever anticipated that the Federal Government should regulate by a general law the means or method of carrying the public by local street car lines, though in its operation it passes from one state into another. The conditions and equipment are so varied that it would be almost impossible to do so, and it is not reasonable to believe that it was ever anticipated. In such cases, then, are the states precluded from enacting police regulations for the health, comfort, convenience, and general good of the public, simply because it affects indirectly, or even directly, interstate commerce. If so, the result is that those engaged in such local commerce are not subject to any regulation. Certain police regulations which interfere or burden commerce, which is exclusively within the power of Congress, may be invalid, but the Supreme Court has repeatedly recognized and sustained police regulations which

affect commerce where it was said it was not exclusively within the power of Congress, and upheld the power of the state. It has been held so often that mere inconvenience or expense to the carrier occasioned by a proper police regulation is no ground of objection to it, that it is unnecessary to cite authority. In support of the position that the regulation is invalid as an interference with, or burden upon, interstate commerce, the plaintiff cites the case of *Houston & Texas Central Railway vs. Mayes*, 201 U. S. 321, where a statute of the State of Texas provided that when a shipper of freight makes a requisition in writing for a number of cars to be furnished at any point indicated, within a certain number of days from receipt of application, and shall deposit one-fourth of the freight with the agent of the company; the company, failing to furnish them, shall forfeit \$25.00 per day for each car failed to be furnished, the only proviso being that the law shall not apply to cases of strikes or other public calamity. The application was for cars to be sent out of the state, and used in interstate commerce. The statute was held to be a burden on interstate commerce, because the law transcends the police power of the state, and amounted to a burden on interstate commerce because the law's only exception for non-compliance was strikes and public calamities. The Court said:

"Although it may be admitted that the statute is not far from the line of a proper police regulation, we think that sufficient allowance is not made for the practical difficulties and administration of the law, and that, applied to interstate commerce, it transcends the legitimate power of the Legislature."

Justices Harland and McKenna dissent, and Justice White not sitting.

"The grievances which the railroad company deems it may endure by the enforcement of the order of the commission as commanded by the court, are expressed in many assignments of error. To consider them in detail is not essential, as all the complaints which they embrace were embodied in the argument at bar by the counsel for the railway company in the following propositions:

"First — The order of the board and the mandate of the state court were, in effect and substance, a regulation of commerce among the states, and the court was without power or jurisdiction in the premises.

"Second — The order of the board on its face is manifestly unreasonable, and in the light of the findings of fact arbitrary and without the first element of due process of law, and a denial of the equal protection of the law guaranteed by the Federal Constitution.

"Third — The order and judgment of the state court on the evidence and facts found, deprived the railroad company of its property without due process of law and without compensation, and denied to it the equal protection of the law.

"Fourth — The order of the railroad commissioners was an usurpation by the board, and the construction placed upon the law by the state court impaired the obligation of the contract between the state and the railway company in violation of the Constitution of the United States, and deprived it of its property without due process of law, and without compensation, and denied to it the equal protection of the law."

The Court then proceeds to dispose of each of the propositions advanced, and with regard to the first said:

"To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of

The statute there affected commerce not in a local sense, and it was upon a subject which Congress may be anticipated to act, and in fact has acted. The regulation was severe, and in fact held to be unreasonable. It does not impress the court as applicable. A case as the court conceives which is applicable, and on principle applied to the facts of this case, is the case of *Missouri Pacific Railway Company vs. State of Kansas*, 216 U. S., 261. In that case the people living along what is known as the Madison Branch of the Missouri Pacific Railroad petitioned the Railroad Commissioners for an order directing the railroad to operate a passenger train over the line. It was then operating mixed trains. The Commissioners ordered that the railroad operate a passenger train over the line from Madison to the Missouri state line, they holding that the people along the line were "entitled to better passenger train service." The railroad failed to comply, and an action for mandamus was instituted.

It was urged that the branch road was an interstate road, and could only be operated as such, and therefore not subject to the jurisdiction of the Commissioners; that the burden would be confiscatory, and that it had operated a passenger train or trains over the road but had been compelled to abandon it because the traffic would not sustain the expense, and was compelled to resort to the operation of mixed trains; that the nearest terminal facilities of the branch road were at Butler, Mo., twenty miles beyond the Kansas line, and that the regulation would require them to operate the trains to Butler in Missouri, unless costly terminal facilities were constructed at the state line. Many other objections were urged as to the unreasonableness of the order. The Court said:

the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri and therefore an interstate railroad. This being its character, the argument proceeds to assert the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce and beyond the control of the State of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter, therefore, left the road for which it provided subject as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the constitution upon the government of the United States.

"The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line where there were no terminal facilities, but in a dis-

guised form, reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. *The order can not be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so.* Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when in fact the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by this order, not only to the state line, but twenty miles beyond to Butler, on the Joplin line, where terminal facilities exist. From these assumptions it is insisted that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But, under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation; and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a burden on interstate commerce would be imposed. *Atlantic Coast Line R. Co. vs. Wharton*, 207 U. S., 328.— Affirmed."

The court in that case not only disposed of the police power of the state to make the regulation, as well as the question of the impairment of the alleged contract, but also disposed of the reasonableness of the order by making the question turn upon public convenience, comfort and safety. The Court said:

"True it is that the road was carrying passengers in a mixed train; that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive it of rights protected by the Constitution of the United States. But when the necessary result of the contention is thus defined, its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort, and safety between travel on a passenger service train and travel on a mixed train; that is, a train composed of freight cars with a passenger car attached, as to cause any exertion of legislative authority for the public welfare, based upon a distinction between the two, to be repugnant to the Constitution of the United States. . . . It can not be said that the carrier of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, so far as the carriage of passengers is concerned."

See also *Missouri Pacific R. Co. vs. Larabee*, 211 U. S., 613; *Harmon vs. Chicago*, 110 Ill., 400.

In what way can it be said that this ordinance affects interstate commerce. The substance of the claim is, that while the ordinance is only operative in Covington; that it affects interstate commerce in that it has not in the State of Ohio, into which it extends, terminal facilities which would permit it to operate sufficient cars to comply with the ordinance in Covington if its cars are operated through from one city to another, and that to comply with the ordinance in Covington would, in effect, compel it to comply with it also in Cincinnati. This contention is exactly similar to the contention in the case just cited to the effect that requiring the railway to operate to the state line of Kansas would in effect compel it to operate passenger trains through to Butler, twenty miles beyond the state line. If the plaintiff's contention is correct, the State of Kentucky and its municipalities lose all power to regulate common carriers within their own jurisdiction, and can not exercise the police power for the protection and comfort of its citizens, simply because the carrier's facilities in other states, over which Kentucky has no power when applied to the manner in which the carrier is then conducting its business, is insufficient to permit it to continue it in the same manner in the foreign jurisdiction, and at the same time comply with the police regulation here. If such is the case, a carrier may abrogate the state power to regulate its conduct here by simply voluntarily adopting a system of doing business in a foreign state, which would render its compliance with the state regulation inconvenient here. The State of Kentucky has no authority to compel the plaintiff to acquire proper facilities in another state, or regulate the carriage of passengers there; and its police power here in its own jurisdiction is not dependent upon what the carrier does, or can not do, in the foreign jurisdiction, nor by what the

foreign state does or fails to do in matters of regulation in the foreign state.

It is a matter of common knowledge that the returns from operating overcrowded cars is much greater than operating them with proper loads, and if the sovereign police power of one state is to be stayed because the carrier fails to obtain in another state sufficient terminal facilities to enable it to comply with the regulation here, and continue its mode of operation there in the same way, then the carrier controls the exercise of the police power in the states in which it operates and not the states themselves; for common experience shows that financial returns are frequently regarded, by carriers, of greater importance than the comfort and convenience of those it serves.

THE CONSTRUCTION OF THE ORDINANCE AND SUFFICIENCY OF IT AS BEING DEFINITE.

It is the contention of the plaintiff that, by Section 5 of the ordinance, it is required to "run and operate cars in sufficient numbers at all times to reasonably accommodate the public, within the limits of this ordinance as to the number of passengers permitted to be carried," and that this provision means that it shall operate sufficient cars to enable all the people who may be at any point on its route to take passage upon its cars without waiting for any other car, and that, therefore, if any car had upon it the number of persons limited by the ordinance, and was, therefore, unable to take any other person found upon its route who was desirous of becoming a passenger, that it would thereby violate the ordinance. This seems to the court a severe and unwarranted construc-

tion of this provision. This provision clearly means that the carrier shall at all times provide sufficient cars to *reasonably* accommodate the public travel, and this should be done without violating the provisions of Section 1, prohibiting the carriage in a car of the number specified therein. This ordinance no more requires that the carrier should be able to receive every person who should apply for passage upon a particular car than its common law obligation to provide sufficient and adequate accommodation requires it.

What would be a sufficient number of cars to reasonably accommodate the public is, of course, indefinite in a sense, but it is of that character of indefiniteness which courts are called upon daily to determine, as the reasonableness or want of reasonableness of acts to accomplish a fixed and definite purpose is constantly called into question.

It is further contended that if this is the construction of the ordinance, then it is too indefinite to sustain the infliction of a fine, for the carrier could never know what would be deemed reasonable, and that what one court might deem reasonable another might deem unreasonable, and that a penal statute must be sufficiently definite to enable one to know what acts would constitute a violation of it. There is authority for this view, and reason to sustain it, and, if applicable here, it only extends to relieving the carrier from the penal clause so far, and so far only, as it imposes a fine for failing to operate sufficient cars to reasonably accommodate the public. It does not render the ordinance void, or stay the infliction of a fine for the violation of any other provision of the ordinance where the act or omission, upon which the penalty is imposed, is sufficient as to certainty. An illustration of this is to be found in the decision of

the Supreme Court in the recently decided Standard Oil Company case.

The law known as the Anti-Trust law declares that "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal;" and further provided:

"Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The fact that the court held that the question of whether a contract was denounced by this act depended upon whether it was unreasonably in restraint of trade was not allowed to render the statute void, but the statute was enforced by dissolving the corporation, because it came within the construction of being within it. The question of whether or not those who violated the statute are subject to a penalty for the violation is a matter yet to be determined; but the fact that the penal clause fails, if it does fail, for want of definiteness in the act denounced, was not permitted to avoid the statute, but it was carried in effect by means other than the infliction of a fine. In the case at bar the duty providing sufficient and adequate means and facilities for the reasonable accommodation of the public in being transported by the carriers is incumbent upon the plaintiff, both by the common law and its charter.

ARE THE REQUIREMENTS OF THE ORDINANCE REASONABLE?

Having reached the conclusion that the ordinance is not in violation of any contract between the plaintiff and the defendant, that it is not a regulation of, or burden upon, interstate commerce, and that the purpose of the ordinance is clearly within the power of the state, and consequently within the power of the municipality, as it does not conflict with the constitution or any statute and does not contravene public policy, it remains to be determined whether the ordinance, in its terms and provisions, in the endeavor to accomplish that purpose, is reasonable.

If the plaintiff operates its line or any cars in Cincinnati, then it operates around three squares in that city, beginning on Second Street, between Walnut and Vine, at the end of the Suspension Bridge; thence east one-half square to Walnut; thence north on Walnut to Fifth; thence west on Fifth to Vine; thence south on Vine to Second, and thence east on Second one-half square to the entrance to the Suspension Bridge. On or around one square it operates upon tracks upon which other cars of the Cincinnati Traction Company operate. That is to say, from Fourth to Fifth on Walnut, and from Walnut to Vine on Fifth, and from Fifth to Fourth on Vine it operates upon tracks burdened with other street car service, but for the rest of the route it operates upon its tracks, upon which there is no other street car service. It is claimed that the tracks from Fourth to Fifth on Walnut, and from Walnut to Vine on Fifth, is so burdened that it will not permit the running of any more cars over it, and that, therefore, this ordinance is void as to it, because it can not get cars around this two sides

of a square to enable it sufficiently to comply with this ordinance. This ordinance does not apply to the side of the square from Fifth to Fourth on Vine, as the burden upon it is much less than on the other two sides of this square. The court has heretofore discussed this proposition in the consideration of the interstate commerce question. Mr. Green testified that these two sides of the square could not be burdened with additional Covington cars *and maintain the schedule*, and later said they could not be operated around it, which, I take it, means with the same qualification he had theretofore made. If that is the correct interpretation, the effect of operating more cars would be to interfere with a schedule, or rather cause the cars during the rush hours to be operated without schedule. Clearly an ordinance would not be unreasonable because cars during the rush hours were required to be operated as fast as might be, even though on the trip they fell behind a schedule. But, in any event, the court holds that this ordinance can not be made operative in Cincinnati, or at least it can not compel it to be complied with if the car company complies with it in Covington; but if, by reason of the manner in which the company conducts its traffic in Cincinnati in connection with its traffic here, the ordinance has the effect of requiring the plaintiff to change the manner of its operation or to acquire additional facilities, that fact can not operate to limit the power of the government here. And if it should be held that under some circumstances it might limit the exercise of the police power here, as in matters of commerce not local, and which Congress has exclusive power to regulate, the condition here, which would require a state to forego the exercise of its police power because a carrier operating in this state fails to acquire in a foreign state proper terminals, or permits its terminals, to the

extent of two squares, to be or to become insufficient to provide adequate accommodations for the public, has not the effect of rendering an ordinance, which fails to recognize that condition as a reason for not furnishing adequate accommodation a burden upon commerce, or to render it invalid for that reason, or to render it unreasonable. The evidence shows that the two sides of a square in Cincinnati, referred to, has been constantly subject to increased burdens from the operation of an increased number of cars from Covington, and will continue to be further burdened as traffic increases, unless, as claimed by the defendant, it has now even reached the limit of the burden it can bear even with the overcrowding of streets cars as an aid, in which latter event further traffic must cease entirely.

If the carrier should fail to provide sufficient cars to carry the public, even in a crowded condition, it certainly would not be contended that an ordinance, which had for its purpose the requirement that sufficient cars be provided, would not be unreasonable because the carrier could not operate enough cars around the terminal to carry the public even in crowded cars. It would fail in its duty as a carrier. The difference between its failure to provide adequate facilities to carry the public, and its failure to provide adequate facilities to carry all the public in a manner reasonably consistent with their comfort and convenience, is not sufficient as a basis for a distinction which would render an ordinance reasonable in one instance, and unreasonable in the other. As heretofore indicated, the court regards, as have all the courts to which overcrowding ordinances have been submitted, the purpose of the ordinance reasonable, and there must be some line drawn which marks the place where it would be deemed an overcrowding. In fixing it so as to permit

one-third of the number seated to stand in the car, the court does not think is unreasonable, and it would not hold even a less number unreasonable. The plaintiff contends that one person to a floor space of the dimension of two feet by one is not unreasonable. The municipality thought otherwise. In the court's opinion, the contention of the plaintiff amounts to nothing more than that the number of people which it can crowd into a car is not unreasonable; measured by the space it fixes as reasonable.

The ordinance is assailed in many other respects as unreasonable, but most of them are based upon an erroneous construction of the ordinance, as heretofore stated. Most of them are based upon the assumption that the ordinance requires the carrier to have at all times, at every place upon its line, a sufficient number of cars, so that it would never become necessary to refuse any one, applying to a particular car for transportation, admission, because of the limitation of the number of persons permitted to be carried by the provisions of the ordinance. Of course, if this were correct, the ordinance would be unreasonable on its face. It only requires the carrier to provide a sufficient number of cars to reasonably accommodate the public. That is what the carrier is required to do now, and claims that it does so, except that in doing it it carries more people in each car. It would hardly be admitted by the plaintiff that it fails in its duty as a carrier under present conditions to furnish reasonable accommodation to the public because of a blockade due to fires or accidents upon its route, or because at some point on its line a crowd should apply to be taken upon a particular car as passengers, and the car could not hold them all, and this occurs every day.

Neither would it be a failure to comply with the ordinance under consideration. Likewise, the argument that

this ordinance does not take into consideration the exigencies of car traffic resulting from theatre traffic, base ball, races at Latonia, amusement parks, the number of people who apply for transportation to the cemeteries, and other traffic where a larger crowd of people apply to be carried than a car would accommodate. In what way does it fail to take these matters in consideration? The carrier provides for them now. The only difference is that it frequently puts eighty or ninety in a car instead of about forty-five. The only effect of the ordinance is to require the number of cars operated to be increased to accommodate the public, and it takes into consideration all the exigencies of traffic which now exist and which is now taken into consideration by the carrier. It is a self-evident proposition, which neither sophistry nor refined reasoning can change, that if a given number of cars, containing ninety persons to each car, can, during a given period of time, accommodate public travel with all the exigencies which attend it, then, twice that number of cars, containing only forty-five persons to each car, can, during the same period of time, accommodate the same public travel with all of the same exigencies that attend it. The fact that it imposes upon the carrier the duty of knowing what number of cars it will require to reasonably accommodate the public travel with attending exigencies, when the number of persons to each is limited to forty-five, is not the imposition of any greater burden than the duty of knowing what number of cars it will require to reasonably accommodate the public travel under the same circumstances, when ninety persons may be carried. The latter is the duty of the carrier, according to its own contention. It is, in fact, the duty of every carrier. For these reasons the court is not at all impressed with the argument that the ordinance fails to

take into consideration the difficulties of anticipating the number of people which at various places may apply to the carrier for transportation, or the delays incident to accident and other traffic. If the ordinance fixed a definite number of cars to be operated and the number of people to be carried in each, and then had made no allowance for the varying conditions of travel, the argument would apply, but the ordinance does not do that. If it did, it would, no doubt, be assailed as arbitrary, in that the number of cars which it provided should be operated, with the limitation of the number which might be carried under varying conditions.

I do not mean to be understood as saying that the evidence discloses that it would require twice as many cars to accommodate the public if they were limited in the number of passengers provided by the ordinance, as is now required under the present manner of operation. That ratio was taken only as a basis for illustration.

The court is of the opinion that the evidence shows that there is not the slightest difficulty in operating a sufficient number of cars in Covington to comply with the ordinance under consideration. The schedule of cars clearly shows it. The only place in Covington where all the lines operate over the same tracks is between Third and Second Streets, where they then go upon the bridge. The bridge is double-tracked, with a driveway in the center. The greatest number of cars which operate over this track during the rush hours is 81 cars per hour, according to the testimony of Mr. Green. On the tracks up Walnut and over Fifth Street to Vine he testifies that the Cincinnati Traction Company operates 254 per hour, and besides that the plaintiff operates 81 cars per hour, which makes 335 cars per hour, and this, too, in the busy part of Cincinnati, with its wagon and automobile travel

using the street. This illustrates how little is left of the proposition, if it is contended for, that there is any difficulty in increasing the number of cars to that which would supply a sufficient number to comply with the ordinance. Without going into detail with reference to the various kinds of accidents which may delay cars, it may be said that such accidents would not operate to hold the plaintiff responsible for the delays under this ordinance any more than it does under the present conditions. In such cases the carrier has not violated the ordinance under any construction to be given it, for it is no more culpable for having 10 cars delayed by such accidents than it is in having 7, or even 1, delayed. Another ground upon which the ordinance is assailed as being unreasonable is that persons will undertake to board cars after the limited number have taken passage, and that this will entail the duty of preventing it upon the company, which may cause controversies and even a breach of the peace, and that it is further unreasonable in that it does not impose any penalty upon one who undertakes by force or otherwise to enter the car after notice that the limited number has been reached. If such reasons as those can be permitted to nullify a police regulation of a carrier, it follows that they are immune. As to the first proposition, the court knows no law that prevents a carrier limiting the number which it will carry in any one conveyance or train to a reasonable number, nor even from regulating or providing the particular coach or place in which they shall be carried.

Chiles vs. C. & O. R. R. Co., 218 U. S., 71.

The carrier may, at any time or place, refuse to receive into any particular conveyance, train, coach, or vessel more than a reasonable number of persons to be trans-

ported. In the operation of trains it may and does provide cars in which smoking is allowed and cars in which it is not allowed, and put people out of cars in which it is not allowed, or else require them to cease smoking; and this power is exercised for the comfort and convenience of its passengers. It is required for the convenience and comfort and probably the peace of the community to have separate coaches for one race and exclude from it the other race, and this is required to be done by the carrier. It would hardly be argued that in permitting one of one race to ride in the coach of the other that it had not violated the law because it was done without the consent of the carrier, or that a difficulty might have arisen had the carrier attempted to comply with the law.

Steamboats and vessels are not permitted by law to take on board any persons beyond a prescribed number. The carrier is required to see that no more than that number are received. The court can not see that the failure to provide a penalty for persons who should attempt by force to enter a car after the required number had been accepted renders the ordinance unreasonable. There is a penalty provided for the actions of persons in cases which have just been mentioned who attempt to prevent the carrier from complying with the law. If one should undertake to enter a car by force, he would become liable for an assault or breach of the peace, or if it did not reach that far it would certainly be disorderly conduct. That an occasional case may arise where this would be done, the court does not doubt, but difficulties upon cars between passengers and conductors are not infrequent, and any unusual difficulty on account of this regulation it seems to the court is visionary, and if such occurrences were more frequent than anticipated by the court, it would be no reason for declaring the ordinance unreasonable

on account of it. It might add something to the strength of the ordinance if it had a provision imposing a penalty upon any one attempting to enter a car after notice to him that the car contained the limited number provided for by ordinance, but I can see where that would deter persons from attempting to do so, for they certainly would become amenable to the law without it. Besides, it would not relieve the carrier, for its agents could not stand by and permit them to enter the cars, whether it was a violation of law punishable by fine or not.

In the case of Pittsburgh Railway Company vs. City of Pittsburgh, decided by the Common Pleas Court of that city, the overcrowding ordinance was held unreasonable because the exceptions provided in the ordinance were not large enough to embrace a great many occasions, when large crowds were to be expected, and because no penalty was provided for persons attempting to board cars after the limit had been reached. The ordinance is not filed with the opinion. In counsel for the defendant's brief, a section of the ordinance is quoted to the effect that it required the company to operate sufficient cars past any point of observation as would accommodate, during every fifteen minutes' period of the day all persons who should apply for transportation, under a limitation of the number to be carried upon each car. That is quite a different proposition from only requiring the carrier to provide reasonable accommodations under an ordinance limiting the number to be carried in each car. However, in so far as that case may hold, if it does hold, that a failure to impose a penalty upon the public for attempting to enter the car after the limited number has been received renders the ordinance unreasonable, this court does not concur for the reasons above given. The provision of the Minneapolis ordinance which was

held valid was like the one here, and provided that the carrier should operate upon its lines "a sufficient number of passenger cars to receive and carry all persons desiring transportation thereon, without admitting into any such car more passengers than the carrying capacity thereof." The ordinance limited the number to be carried to 75. It was held there that upon extraordinary occasions that carrier would not be able to carry all the public that might apply at one time; but, while it would be guilty of a violation of the ordinance if it accepted into its cars more than the limited number, it would not be guilty of a violation by reason of the fact that it failed to supply a sufficient number of cars to immediately transport them. In other words, the duty of the carrier to anticipate the number of persons to apply for transportation was not violated by its failure to anticipate that extraordinary crowds would apply at a particular time for transportation. The Detroit ordinance, as shown by that opinion, was contradictory, for, after limiting the number to be carried by each car, it imposed a penalty for not stopping and receiving passengers. As to the provision requiring the cars to be fumigated, it seems to the court to be reasonable. As to the provision requiring the temperature to be not less than 52 degrees, it appears from the evidence that this can not always be maintained when the doors are required to be kept open for a length of time to admit or discharge a number of passengers. If so, it is unreasonable and can not be enforced, but the court does not understand that in proceedings such as this, where the court is of the opinion that the ordinance is valid, except, perhaps, as to one or two minor provisions, that it is the duty of the court to pick out these one or two minor regulations and enjoin prosecutions upon that ground. The action is to enjoin all

prosecutions under the ordinance upon the ground that it is void. If it is not void as a whole, the questions as to whether a prosecution for some minor provision of the ordinance can be defeated because it is unreasonable, is a question which should be determined by a court having jurisdiction to try such offenses.

It is not for the court to determine whether or not this ordinance will operate successfully, nor is it for the carrier to complain that the public, by this ordinance, is depriving itself of the privilege of crowding cars, which, it is claimed, it loves to do. The ordinance has for its purpose a lawful one. It is within the power of the municipality to enact it, and it violates no constitutional or other right of the plaintiff, and in the court's opinion is reasonable, and that is all that can be passed upon by the court.

JUDGMENT.

It is adjudged that the temporary injunction herein be dissolved; that the plaintiff's petition be dismissed and that the defendant recover of the plaintiff its costs herein, to all of which the plaintiff excepts and prays an appeal to the Court of Appeals, which is granted. ¶ 4